UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

In the Matter of:	x	Chapter 11
LEHMAN BROTHERS HOLDINGS INC., ET AL.,	x	Case No. 08-13555(SCC)
	x	(Jointly Administered)
Debtors.	x	
In the Matter of:	x	
LEHMAN BROTHERS HOLDINGS INC.,	x	Case No. 08-01420(SCC)
Debtor.	x	(SIPA)

U.S. Bankruptcy Court

One Bowling Green

New York, New York

May 14, 2014

10:17 AM

B E F O R E :

HON. SHELLY C. CHAPMAN

U.S. BANKRUPTCY JUDGE

HEARING Re Trustee's Objection to the General Creditor Proof of Claim of Cornell Companies Inc. (Claim No. 4393[LBI ECF No. 8046]

HEARING Re Lehman Brothers Holding Inc., et al. v. AmeriCredit Financial Services Inc., et al. [Adversary Proceeding No. 11-02403]

HEARING Re Lehman Brothers Special Financing Inc. v. Bank of America, et al. [Adversary Proceeding No. 10-03547]

HEARING Re Lehman Brothers Special Financing Inc. v. Bank of America National Association, et al. [Adversary Proceeding No. 10-03542], Lehman Brothers Financial Products Inc. v. The Bank of New York Mellon Trust Co., National Association, et al. [Adversary Proceeding No. 10-03544], Lehman Brothers Special Financing Inc. v. The Bank of New York Mellon Corporation, et al. [Adversary Proceeding No. 10-03545], Lehman Brothers Special Financing Inc. v. Wells Fargo Bank National Association, et al. [Adversary Proceeding No. 10-03809], Lehman Brothers Special Financing Inc. v. Bank of New York Mellon National Association [Adversary Proceeding No. 10-03811]

HEARING Re Motion of Group of Defendants to Modify Certain

Orders Affecting Litigation of Adversary Proceeding [ECF No. 43983]

HEARING Re Four Hundred Fifty-Eighth Omnibus Objection to Claims (No Liability Claims) [ECF No. 43532]

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P R O C E E D I N G S

THE COURT: All right.

MS. MARCUS: Good morning, Your Honor --

THE COURT: Good morning.

MS. MARCUS: -- Jacqueline Marcus of Weil, Gotshal & Manges LLP of for Lehman Brothers Holdings Inc. and its affiliated estates.

We're here today for the 73rd omnibus claims hearing. We start this morning's calendar with one contested matter in the Lehman Brothers Inc. proceeding that will be handled by Mr. Fitzpatrick on behalf of the SIPA Trustee.

THE COURT: All right, thank you.

MR. FITZPATRICK: Good morning, Your Honor.

THE COURT: Good morning.

MR. FITZPATRICK: James Fitzpatrick from Hughes Hubbard for the LBI Trustee.

Your Honor, I know that Your Honor has our papers and I won't rehash all of the arguments in there, but if I could briefly I think it's helpful to look at the three alleged causes of action individually in order.

THE COURT: Okay.

MR. FITZPATRICK: I think that's the most logical way to address them. And if I could start, Your Honor, with Cornell's alleged breach of contract claim.

THE COURT: Okay.

MR. FITZPATRICK: Based on Cornell's own pleadings and on the plain language of the contract we'd submit it's clear there's no alleged breach of contract here.

If Your Honor looks at paragraphs 45 and 46 of the Cornell Company's response that's where Cornell specifies in its papers in the most detail what the purported breaches of contracts are, but all that they say are that first there was an Alaska correctional facility's project that did not close. That may be true, but there's nowhere in the contract where LBI makes any guarantee or promise that any particular project will close.

The retainer agreement is very clear that Lehman will provide advice to Cornell, there's no allegation that LBI did not provide that advice. The only allegation is that a particular project did not close and there's no guarantee in the contract that it would.

So based looking at just the plain language of the contract as well as that particular allegation we'd submit it is clear there's not even a pled breach of contract claim there.

The second thing Cornell points to Your Honor is the way that LBI looked for accounting purposes the payment that it received under the retainer agreement and they claim that that is somehow a breach of the portion of the retainer

agreement that states that the retainer fees will be applied on a mutually agreed basis towards future contingent fees.

Again, we'd submit that what the contract is clearly saying is that you pay an up front non-refundable retainer and when LBI does work in the future you won't have to make future payments because you've already paid the retainer. The contract is not saying anything, nor could it be saying anything, about how LBI is supposed to treat that revenue internally for its own accounting purposes. And again, we'd submit that's plain on the face of a contract. It's no different than a retainer agreement that a law firm would enter into, clearly the clients -- what's the client's concerned with is when -- is when it's going to have to start making payments for future work, it's not concerned with how the law firm is going to book the revenue for its own internal accounting purposes.

So starting with the breach of contract claim there's no statute of limitations analysis necessary for that at all. It's just a straightforward, if Your Honor looks at the allegations and looks at the contract itself, there's no pled breach of contract claim.

We'd also submit that's a critical point, Your Honor, because all the parties agree that for the other two claims, fiduciary duty and fraud, the only way that they are saved from a statute of limitations perspective is if

they're -- if they're saved by the tolling agreement. The tolling agreement on its face is clear that it is only tolling claims that arise out of or are related in any way to the retainer agreement, which as we've just established has not been breached. So the only claims that Cornell could have are claims that relate to or arise out of a contract which we'd submit clearly has not been breached.

Start with the -- nonetheless they allege two, fiduciary duty and fraud. Starting with fiduciary duty. Here's where Cornell really wants to have it -- or needs to have it both ways in order for the claim to proceed, because in order for the claim to have been saved under the tolling agreement it had to relate to arise out of the contract.

THE COURT: Right.

MR. FITZPATRICK: The contract however on its face expressly disclaims any fiduciary duty between the parties.

Cornell doesn't dispute that that's what the contract says or that that's what the contract means, what Cornell argues in its response to the trustee's objection in paragraph 41 in its only response here is that no, it's fiduciary duty claim has nothing to do with the contract, it all relates to conduct that occurred before the retainer agreement.

Now first of all they don't specify what that conduct is and the trustee is frankly at a loss as to what

that conduct could be, because all that happened prior to the retainer agreement under both sides' contentions is that there was a successful sale leaseback arrangement. The only allegation that something went wrong is that the retainer agreement itself had an impact on that sale leaseback, but prior to the retainer agreement there couldn't have been any breach of fiduciary duty because there was nothing other than a successful sale leaseback operation.

In any event it's not clear to us what Cornell is alleging or how Cornell is alleging that LBI breached a fiduciary duty prior to the retainer agreement, but even if it were alleging something it's going to be barred by the statute of limitations, because again, the only claims that can be saved for statute of limitations purposes are those that relate to the contract, and they necessarily have to say we don't relate to the contract in order to avoid the contract's express exclusion of fiduciary duty claims.

So that's fiduciary duty.

THE COURT: Well, I think -- well this is maybe more appropriate for Cornell's counsel, but I think they're trying to get around that with the -- by making the point that everything was fine until Arthur Anderson questioned the effect of the retainer agreement on the accounting treatment of is SPV and that's how they allege they get into 2002. I think that's how they thread the needle, but I'll

raise that with them.

MR. FITZPATRICK: Agreed, Your Honor, and that may be best raised with them, but even fit gets into 2002 it's not saved for a statute of limitations unless that tolling agreement applies.

THE COURT: Correct. Right.

MR. FITZPATRICK: And the tolling agreement says it has to relate to the -- to the contract. And so we'd submit that they can't disclaim any relationship to the contract or else it's going to lose the effect of the tolling agreement.

THE COURT: Okay.

MR. FITZPATRICK: With respect to the fraud claim, Your Honor, again, the trustee has had some difficulty evaluating the claim because it hasn't been pled with any specificity in our view what the fraud -- what the purported fraud is.

If we turn to Cornell's response to the trustee's objection, again in paragraphs 35 and 37, are where we see Cornell attempting to plead what the fraud would be, but the only thing that they point to is statements by LBI that it had expertise and that it had done this before, and we'd submit that can't be fraud for a number of reasons.

First of all statements that we're good at that and we know how to do this and we've done it before are

routinely considered puffery and not fraud under the case law.

Second they haven't even pled that those allegations are false. There's no allegation that LBI hadn't done this before.

And third, again, that's not related to the retainer agreement, and LBI stating that it had done this before is not related to the retainer agreement in any event and so it's not going to be saved from the statute of limitations by the tolling agreement.

At other -- now I will say Cornell's claims have seemed to evolve a bit from when it went from the claim to its actual response to the trustee's objection.

Under the claim the trustee initially interpreted the fraud claim to be one that we gave an opinion that this would all be okay essentially, that we could enter into the retainer agreement and save the accounting treatment. Cornell appears to have moved away from that. There's no -- there's no statement in the response of what exactly was said, who said it, who heard it, that it was relied on, that it was known to be false at the time, all of which would be necessary to plead a valid fraud claim. And so at least as we understand it Cornell has moved away from that, but to the extent they haven't Your Honor has our briefing on why it's extremely -- there's an extremely high bar to prove

fraud on a -- for an opinion, and certainly that hasn't been pled here in terms of we would -- for example, whoever made that statement, which is not pled, would have to have known it was -- known the opinion was false.

THE COURT: Well it seems to have -- it seems to be if you look at paragraph 37 it seems to have zeroed in on the idea that once the problem with the retainer agreement surfaced that at that point LBI did something bad by refusing to give the money back and save the SPV transaction. That seems to be the -- where the bad crystallizes.

MR. FITZPATRICK: I agree that that's at least suggested in these paper, Your Honor, but that's -- I mean even if that's true that's clearly not fraud, there's no statement, there's no false statement, et cetera. It's not clear to me what that cause of action would be. Maybe it's closest to breach of fiduciary duty, but if that's true we're now in the post-contract period where we've disclaimed any fiduciary duty.

THE COURT: Are there allegations about the genesis of the entire -- well are there allegations about the genesis of creating the sale leaseback transaction from the outset? Was that -- whose idea was it?

MR. FITZPATRICK: I believe it is certainly alleged that LBI at least played a significant role in that.

That is part of the background information of the claim. But again, the sale leaseback, even pursuant to the allegations, was fine in and of itself. The issue, if the allegations are true, arose from the existence of the retainer agreement.

Now I expect there would be -- if this were to proceed there'd be a dispute about whether in fact LBI did anything wrong under the retainer agreement at all, but for purposes of where we are today, you know, what we'd submit is that the three causes of action that are pled are not -- are not valid causes of action.

THE COURT: Okay. All right.

MR. FITZPATRICK: And the last point, which I think is sufficiently briefed, Your Honor, is even if they had pled fraud here even the tolling agreement isn't going to save them, because the fraud was complete if there was one as of the time of the payment of the retainer agreement. Because even under the allegations that destroyed the accounting treatment. It -- and that's what starts the limitations. And both parties agree that that was before the critical December 7th date.

What Cornell tries to do so save it is to say that no, the cause of action didn't accrue until we were damaged and they claim they weren't damaged until either Arthur Anderson questioned it --

THE COURT: Right.

MR. FITZPATRICK: -- or they themselves restated it, and we'd submit under Texas law (a), that's not when the cause of action accrues, and (b), it doesn't even really make common sense, because under their theory they would be determining when their cause of action accrued by when they restated their argument.

Thank you.

THE COURT: Okay, thank you.

(Pause)

THE COURT: Good morning.

MR. SIEGEL: Good morning. David Sigel for Cornell, Your Honor.

THE COURT: Good morning.

I want to pick up where -- on the last point that was made with respect to the operation of the statute of limitations, and the point was made that the way you have set this up when the cause of action accrues is out of the control of LBI. In other words, Arthur Anderson comes on the scene in 2002 and questions the sale leaseback transaction because of the existence of the retainer agreement, and you say, well that's when the cause of action accrued before -- because before then as far as we knew everything was hunky-dory, okay?

Arthur Anderson might not have come in at that

point. Maybe nothing would have happened until you get close to the limitations period that the IRS has for looking at transactions. I'm somewhat making this up but you get the idea of the hypothetical.

In the meantime LBI is not concealing anything, everything is rolling along under the documents, and then at that point the IRS says, oh, hold on, we question this sale leaseback transaction because of the existence of this retainer agreement.

Surely it can't be the case that the party who should enjoy the benefit of the protection of the statute of limitations is then at the mercy of some third party questioning the transaction.

The transaction was done, they should be done. It shouldn't turn on whether or not somebody -- when somebody elects to question it in the absence of any allegation, which I think there is none, that somehow LBI did something that caused the discovery rule to come into effect or for there to be a tolling.

So that's kind of -- that's my -- one of my leading concerns coming into this today.

MR. SIEGEL: Well, let me address that, Your Honor, first by saying in the evidence that was adduced to the response of the trustee's objection we do cite deposition testimony from Mr. Lavel (ph) who was a senior

vice president at Lehman at the time, saying that he understood at the time that the retainer payment was accepted that it could have an affect on the three percent equity of the special purpose vehicle.

So there really is an allegation that with the knowledge that acceptance of that retainer fee at that time could jeopardize or put in jeopardy the entire structure that had been put in place he nevertheless accepted the payment, and so there is an allegation that he understood that it was dangerous --

THE COURT: But you knew --

MR. SIEGEL: -- accepted the payment, and didn't tell anyone.

THE COURT: No, no, no, but that's -- that's the opposite of what I'm saying. So all of that was out in the open. So he --

MR. SIEGEL: No --

THE COURT: -- acknowledges that accepting the payment could have a --

MR. SIEGEL: No, he acknowledged it after the fact in a deposition. We're not saying he said anything at the time --

THE COURT: But that's not --

MR. SIEGEL: -- in 2002.

THE COURT: But in the absence of an allegation

that Mr. Lavel or anyone was an architect of this -- of a scheme that somehow Cornell was not aware of the implications of it, the fact that he later acknowledged that he thought it could have an impact on it that's not his call.

The -- Cornell proceeded with the transaction, Cornell voluntarily entered into the retainer agreement, and we're perfectly content to go ahead unless and until somebody raised questions. LBI wasn't preventing anybody from looking at it. Arthur Anderson came in when they came in.

MR. SIEGEL: Your Honor, I think ultimately for purposes of the limitations argument our position is that it's not dependent on any evidence that Lehman was concealing or withholding this information. We cite the Texas Supreme Court case, the Atkins case in the brief, and also the Waxler (ph) case, and they both say that there's no -- cause of action doesn't accrue and limitations begin running until there's been a legal injury, and the Carlson (ph) case is instructive on this point because it involved an allegation of professional malpractice by an accountant who switched from one accounting method to another on behalf of a plaintiff and then it was many months I think years later before the IRS determined that that method was improper and issued a deficiency notice and assessed the

plaintiff. And the court held there was simply no injury until -- until the plaintiff had been assessed and paid -- and paid the taxes. And that case is directly on point. Any number of months could have gone by with all parties being ignorant that the IRS was ultimately going to say there was problem --

THE COURT: So --

MR. SIEGEL: -- and when they did --

THE COURT: -- five years later if the IRS had said there was a problem you're --

MR. SIEGEL: I don't know -- I don't know if it was five years in that case, but the --

THE COURT: Well --

MR. SIEGEL: -- Texas Supreme Court said that it could be delayed, and that delay was not --

THE COURT: But in my --

MR. SIEGEL: -- dependent on the --

THE COURT: -- but in my hypothetical if Arthur Anderson, taking an aggressive position, had said that it was fine, hadn't questioned it, and then five years later when the IRS statute of limitations is about to run for this tax year then they questioned it, your argument would still be that there could be an cause of action -- a non-time barred cause of action against LBI? That just doesn't feel right. That's not what a statute of limitations is supposed

to do.

MR. SIEGEL: Well, I think ultimately if the delay were long enough then maybe a statute of repose would come into play --

THE COURT: Well, I don't --

MR. SIEGEL: -- but for periods -- for purposes of limitation that's what the Texas Supreme Court said that the injury can -- the fact of the injury -- and we're not talking about the discovery of the injury, we're talking about the injury actually occurring when the IRS issues the deficiency or when this transaction has to be restated. When that happens the injury happen ands then the clock begins running.

THE COURT: Okay. All right. Why don't I let you say what you were intending to say before I asked a question.

MR. SIEGEL: Well, Your Honor, just in terms of limitations in general of course you noted yourself that the way we're trying to thread the needle here, and we don't think it's really threading the needle, we think it's fairly straightforward, is that the tolling agreement saved any cause of action for which a limitations defense wasn't already available on the date of the tolling agreement.

THE COURT: Right.

MR. SIEGEL: We say that Arthur Anderson raised a

concern about this structure in early 2002, we give you the deposition testimony there of the Lehman personnel saying that they didn't even respond to the concern raised by Arthur Anderson until February of 2002, at or about the same time Cornell convened a special committee of its board to conduct an investigation.

All of these things were happening in early 2002, the decision was then made that its earnings had to be restated. These were -- all of these things happened several months after what would have been the cutoff date under the tolling agreement.

So it's our position that it's clear cut that these causes of action were not subject to a limitations defense in December of 2001 when the tolling agreement was entered into.

Now with respect to the arguments that were made about the merits of the causes of action. First with respect to the breach of contract.

The essence of the breach of contract claim is that the retainer fee was accepted and booked immediately when the retainer agreement itself says that it should be applied toward future contingency fees. Had that been done the sale leaseback special purpose vehicle transaction could have been preserved. It was the decision to accept payment immediately and book it immediately that destroyed the

treatment -- the accounting treatment under the special purpose vehicle.

And so it is a breach, it's a straightforward breach of the terms of the agreement which called for payment to be attributed going forward when work was done. And that's the other reason why the contract was breached, no work was done.

The trustee takes the position that there's only a reference to one particular project, and of course that project was never completed, but what the retainer agreement contemplated was financial advisory services to be provided going forward so that further financing arrangements like the one that had been concluded in 2001 could be done. None of them were ever done, there's no -- there's no evidence brought forth by the trustee that any work was performed under that contract.

So it's a fairly straightforward cause of action. You took $3.65 million and you didn't do any work, and not only did you not do any work but you took the payment in such a way that you knew would jeopardize the work that had been done in the prior year.

THE COURT: Well point to me -- I mean it is called a retainer agreement, right? So that suggests that a retainer was paid, right?

MR. SIEGEL: Right.

THE COURT: And what you're saying is that Lehman -- LBI did not have the ability to apply that internally as a matter of its own accounting practices as it saw fit. Is that what you're saying?

MR. SIEGEL: Yes, especially given that what the language says is that it should be applied toward future contingent fees, and that's what it said. Had they wanted to book it immediately then that language should have read differently in the --

THE COURT: But the language that says applied toward future contingent fees is as between Cornell and LBI, it doesn't necessarily drive how LBI internally would have booked that revenue so to speak.

MR. SIEGEL: I think that's right, Your Honor, but there was -- I mean obviously there was a supposition on my client's part that work was going to be performed in order to earn that fee and no work was performed. That's the basic allegation.

THE COURT: Well what does the contract say? What -- what was the quid pro quo?

MR. SIEGEL: The quid pro quo for the retainer fee --

THE COURT: Yeah.

MR. SIEGEL: -- was to advise on similar deals like the 2001 transaction --

THE COURT: Okay.

MR. SIEGEL: -- that the retainer fee relates to, that the --

THE COURT: But -- but that's what I'm struggling with, because if it was a retainer fee I'm paying you this money to retain you to do what I ask you to do in the future and then I happen to not ask you to do something I get to keep the retainer fee. Or if I do ask you to do something then you apply that against the fees that would otherwise be payable for what I've asked you to do.

So so far I'm not -- I'm not quite there with you yet.

MR. SIEGEL: Well Cornell certainly takes the position that it wanted further work done and that it asked for work to be done and that no work was done.

THE COURT: Is that alleged in the complaint?

MR. SIEGEL: I believe it is, Your Honor. I actually don't have the complaint in front of me.

THE COURT: Let's see. Count I is -- when you're injured. Count I, breach of contract. Defendant has not used its best efforts to provide Cornell with finance opportunities. Defendant's failure to use its best efforts is in direct breach of the contract.

MR. SIEGEL: And if you read the -- read the deposition testimony that we affixed to our response none of

the opponents could have --

THE COURT: Excuse me.

MR. SIEGEL: -- none of the opponents could identify a single project that they could tie to the acceptance of this retainer fee.

(Pause)

THE COURT: So that's the -- that's the total of it is that the -- LBI did not use its best efforts to provide Cornell with finance opportunities.

MR. SIEGEL: Yes.

THE COURT: That's it.

MR. SIEGEL: That's it. That's the breach of contract claim.

Of course I would add, Your Honor, that the record, you know, the record was in the process of being made on all of these claims when Lehman filed bankruptcy and everything was stayed. I mean what -- you know, my client's central position here today is that the trustee is seeking what is in essence a summary dismissal of these claims without them having been fully litigated or discovered.

THE COURT: And then Count II you are alleging that LBI induced Cornell to do the whole scheme.

MR. SIEGEL: Yeah, I mean the representations that were made were we have experience with these kind of financing arrangements, we've done this successfully in the

past, and it's even more specific than that. Mr. Lavel admits that conceived -- Lehman Brothers conceived of the structure whereby Lehman would take the three percent equity in the special purpose vehicle. And so part of the fraud claim is a failure to disclose that if Lehman was going to take the three percent equity that could be jeopardized by accepting the retainer fee when the retainer agreement was signed. And this was all -- you asked counsel for the trustee who conceived of the plan? Lehman did. And given that Lehman conceived of it it should have been -- had a heightened sense of awareness of the impact of accepting this retainer fee.

THE COURT: And then Count III is the breach of fiduciary duty, which is somewhat made up I have to say. I mean the idea that there was a fiduciary relationship before there was any formal relationship --

MR. SIEGEL: Actual, Your Honor, the formal -- the retainer agreement comes at the end of what had already been --

THE COURT: Sure.

MR. SIEGEL: -- a two-year relationship and it was designed to, as you said, retain Lehman services going forward. But they're not -- it's not completely distinct from what came before it because of the operation of accepting the retainer fee. Had Lehman --

THE COURT: Well you say --

MR. SIEGEL: Had Lehman dreamt up --

THE COURT: -- you say it arises -- that it arose based on their duty to provide Cornell investment services and advice regarding the sale leaseback transaction.

MR. SIEGEL: Right.

THE COURT: It still doesn't sound like a fiduciary duty.

MR. SIEGEL: Cornell was in the business of operating detention facilities. It wasn't an investment bank. It hired Lehman for Lehman's expertise in arranging financing. It's the specific reason it hired Lehman. It believed Lehman's representations about its expertise to be able to arrange these kinds of deals. And we contend that with a disparity in expertise --

THE COURT: But what was the -- how --

MR. SIEGEL: -- fiduciary duty arises.

THE COURT: What was -- how did the relationship come into being pursuant to which Lehman provided -- allegedly provided the advice regarding the sale leaseback transaction? As you said the retainer agreement comes at the end.

So what you're saying is that there's a fiduciary relationship because LBI had a duty to provide Cornell advice regarding the sale leaseback transaction.

MR. SIEGEL: Your Honor, I frankly don't know who made the first phone call. I think the relationship existed since at least 1999. I suspect that Cornell sought financing to expand its operations, went looking for investment banking expertise and found somebody at Lehman, the relationship began, the sale leaseback transaction took at least 18 to 24 months worth of work, and during that entire time we contend that a fiduciary relationship arose.

THE COURT: Okay. All right, thank you.

MR. SIEGEL: Thank you, Your Honor.

MR. FITZPATRICK: Your Honor, just a few points.

In connection with the breach of contract claim I now understand, although this is not how I read Cornell's opposition, that the breach of contract claim is a failure to do any work under the retainer agreement. I don't think that can be Cornell's intention.

Paragraph 45 of their response to the trustee's objection specifically says that Jim Lavel testified that even though LBI worked on that project for at least two years it never closed.

So there can't be an allegation that LBI didn't provide advice. Cornell has specifically said LBI worked on it for two years, what they say here is that it didn't close, and as we've already said the contract never guaranteed that it would.

THE COURT: Well the way I'm reading that allegation, which is admittedly pretty succinct, is that it was supposed to be bringing lots of opportunities.

So perhaps the -- perhaps what they're alleging is well maybe there was one but it didn't use its best efforts to find -- provide financial advisory services concerning future financing vehicles and strategic develop of Cornell's business, including advice with respect to acquisitions, joint ventures, et cetera, et cetera. So it seems like it's a -- it was a broader scope of work.

MR. FITZPATRICK: Well if that -- if that is the contention, Your Honor, first of all I'm not aware of any allegation that Lehman Brothers was asked to do something and didn't, and the contract is specific that Lehman will, if requested by the company, advise the company with respect to any financing, et cetera. I'm not aware of any allegation that we were asked and didn't provide something. The contract also is expressed that nor does it commit Lehman to provide or underwrite financing for future projects. So that's not -- you know, that's disclaimed.

So regardless, Your Honor, I don't -- I don't think there's any allegation that points to anything specific that Lehman didn't do that would be a breach of the contract.

THE COURT: Okay. Do you have a response to the

description of the way the statute of limitations works in Texas?

MR. FITZPATRICK: Yes, Your Honor.

There are a series of negligence, not fraud, cases in Texas in which the court has held in situations where -- for example, in the case cited by Cornell a business sought tax advice -- the tax -- the accountant switched essentially -- and I might have this backwards -- from like the accrual method to another method. Something that in and of itself the court said was not wrongful and so there was no damage at that time because nothing bad had happened. Nothing bad happened until the IRS came and gave an assessment, and under that scenario in a negligence case where there was no damage until the IRS came in the court did say that's when it accrues, even recognizing that there could be some delay. But that's different from fraud. These are all negligence cases where the Texas courts hold this.

In fraud the law is -- in a fraud case is law is clear that the -- first of all it's actionable as soon as the fraud is perpetrated, and second of all where an act in itself is wrongful as soon as there's any legal injury at all, even if it's not discovered yet and even if most of the damage hasn't happened yet, it becomes actionable. And under Cornell's own pleading the accounting treatment of this was destroyed. They plead and we'd submit that -- we'd

submit of course if this went further that that's not true and that Arthur Anderson was overreacting -- but under their own pleading the whole point of the sale leaseback was destroyed once LBI accepted payment of the retainer agreement -- the fee under the retainer agreement, and it's undisputed that that's outside of the limitations period.

The subsequent acts of what Arthur Anderson advised and how Cornell decided to take that advice and what they -- what they put in their 10-K, which again as we note in our papers, actually stated that Lehman's position was reasonable, but nonetheless they put that in there -- they put that in their 10-K. That can't be when the cause of action accrues. They can't have control over when their own cause of action accrues.

And just the last -- the last point, Your Honor, with respect to the -- the fraud claim. To the extent the allegations are -- and I'm not disputing them for purposes of where we are today that the structure was conceived by LBI -- again, that's not -- that's not a fraud claim. There has to be an actual misrepresentation, and the only misrepresentation that we've seen in any of the papers is that, you know, we've done this before, we have the expertise, (a), there's no allegation that that's false, and you know, certainly -- certainly no allegation that the person making that intended -- you know, was intentionally

making a false statement, and fraud has to be pled with some particularity, and that certainly isn't present here, Your Honor.

THE COURT: Okay.

MR. FITZPATRICK: Thank you, Your Honor.

THE COURT: All right.

Okay. Well, I will take this under and get back to you. I would certainly suggest that to the extent that the parties haven't already contemplated the possibility of an economic settlement you might want to do that since my ruling is likely to be up or done. So it might be a good idea for you folks to talk to each other.

I do note that there's a request for among the out-of-pocket expenses and the retainer $50 million for damages for the corporate enterprise, so it's quite a large demand.

So, thank you.

MR. FITZPATRICK: Your Honor, I believe that's the only LBI matters.

THE COURT: I believe it is.

MR. FITZPATRICK: Okay. May we be excused? Thank you, Your Honor.

THE COURT: Yes, thank you. All right.

MS. MARCUS: Your Honor, turning to the LBHI matters. Item 2 on the agenda is the status conference in

the adversary proceeding captioned LBHI versus AmeriCredit Financial Services. That'll be handled by David Cohen of Milbank.

THE COURT: Okay, thank you.

MR. COHEN: Good morning, Your Honor.

THE COURT: Good morning.

MR. COHEN: David Cohen, Milbank, Tweed, Hadley & McCloy here on behalf of LBHI as plan administrator and LBSF, and we're here for a status conference on the adversary proceeding that LBHI commenced against --

THE COURT: All right.

MR. COHEN: -- AmeriCredit.

THE COURT: And I thought I saw Mr. Reinthaler out there didn't I?

MR. COHEN: He is right there.

THE COURT: I don't have good sight lines up here.

Well, I think the reason for coming in today was simply to discuss scheduling.

MR. COHEN: Okay.

THE COURT: I don't think you had any expectation that we were doing anything on the merits today did you?

MR. COHEN: That was our understanding is that we were not doing anything on the merits.

THE COURT: Not doing anything of the merits. Okay.

Well it seems to me, and I think today demonstrates, that for substantial matters it's a good idea to take you on a -- put you on a special day.

MR. COHEN: Certainly.

THE COURT: Rather than you have to be here with a large crowd. So should we -- is this -- it's fully briefed?

MR. COHEN: It is fully briefed.

THE COURT: It is fully briefed. All right. Why don't --

MR. COHEN: And we are generally available. I think there are some scheduling issues on the defendant's side.

THE COURT: Okay. Mr. Reinthaler, why don't you come on up and let's try to -- and perhaps we could have done this over the phone. I apologize.

MR. REINTHALER: No, I told Mr. Cohen before the hearing began that we're available before May 24 or any day after June 20.

MR. COHEN: As the Court may now I have another hearing in this court and I took my vacation already.

(Laughter)

THE COURT: Okay. I am not available before May 24th, so when was the --

MR. REINTHALER: Any day after June 20.

THE COURT: Any day after June 20. How about --

would you like to come -- Mr. Cohen, you come up from Washington.

MR. COHEN: Yes.

THE COURT: How -- would you like to come on the afternoon of Monday, June 23rd? Is afternoon better for you for travel?

MR. COHEN: That would be fine, Your Honor.

THE COURT: All right. So let's do that on the afternoon of June 23rd, 2 o'clock.

MR. COHEN: Thank you, Your Honor.

MR. REINTHALER: Thank you.

THE COURT: All right. If for some reason there are developments in the next couple weeks in other matters where I have to give those -- give that date to someone who needs it more urgently we'll call you and let you know.

MR. COHEN: Thank you very much, Your Honor.

THE COURT: All right? Thank you.

MR. REINTHALER: Thank you.

THE COURT: Thank you for coming in today. Okay.

MS. MARCUS: Jacqueline Marcus again, Your Honor.

Item 3 on the agenda arises in the adversary proceeding captioned Lehman Brothers Special Financing Inc. versus Bank of America. It's adversary proceeding 10-3547, which we refer to generally as the distributed action.

THE COURT: Right.

MS. MARCUS: Today's hearing relates to the proposed scheduling order that addresses how this action will move forward as well as various objections filed in connection with that order.

Inasmuch as I believe Your Honor this is the first substantive hearing we've had before you with respect to the SPV avoidance actions with the Court's permission I thought I'd start with a brief summary of how we've gotten to this point.

THE COURT: Sure. I was in the courtroom at Judge Peck's last hearing so I heard some of it, but it certainly couldn't hurt to hear it again.

MS. MARCUS: Okay. Well, I won't give you too much of it then, and I read in the newspaper that you were in the courtroom and I didn't see you that day.

Mr. Defilippo of Wollmuth Maher & Deutsch will actually handle the --

THE COURT: Okay.

MS. MARCUS: -- revised proposed order when I'm through.

So beginning in the fall of 2009 Judge Peck entered a series of orders that established alternative dispute resolution procedures for dealing with affirmative claims of the debtors under derivatives contracts.

The original order was supplemented by an order

approving procedures for so-called Tier II matters which were matters with recovery potential of less than five million, and another order that was initially entered in March of 2011 that provided special procedures for affirmative claims of the debtors for derivatives transactions with special purpose vehicles.

The avoidance actions were commenced on or about September 15th, 2010.

We generally group the derivatives related avoidance actions into two groups. The distributed action was commenced as a defendant class action and the defendants are noteholders in the SPVs. In the non-distributed actions the defendants are the SPVs themselves.

The difference is that in the distributed action the applicable SPV issuers had made distributions to their respective noteholders, and the non-distributed actions, the funds that are the subject of the disputes, remain in the possession of the SPV issuers themselves.

Although at the time the avoidance actions were commenced the ADR process was in its infancy, the debtors commenced the litigation in order to be sure to preserve valuable causes of action.

Accordingly, in order to provide the debtors and all of the defendants with the opportunity to allow the ADR procedures to play out the debtors sought and obtained stay

of the avoidance actions in effect freezing these actions.

For ease of reference and to be consistent with the pleadings filed by LBSF and others I'll refer to this stay as the litigation stay.

The litigation stay applies to all avoidance actions whether or not they involve derivatives matters and regardless of whether an ADR is pending as to such action.

As Your Honor is aware, and you just eluded to, the litigation stay was extended by Judge Peck numerous times, most recently in January of this year.

In addition to the litigation stay there's another stay that is triggered by the commencement of an ADR proceeding pursuant to the SPV ADR procedures order. We'll refer to that stay as the SPV ADR stay. It is triggered by the delivery of an SPV derivatives ADR package.

Pursuant to the amended SPV ADR order the SPV ADR stay continues until settlement or termination of a particular mediation.

In January the plan administrator on behalf of the estates made a final request for an extension of the litigation stay and outlined a process for arriving at a scheduling order that will determine how these cases will move forward.

With respect to the distributed action we are at the tail end of that process and are before you today

seeking a scheduling order that will govern this action.

With respect to the five non-distributed actions we're a bit further behind, and as the Court will hear when we get to item 5 on the agenda, the scheduling conference, the plan administrator proposes that we effectively model the scheduling order in those actions on the order that the Court enters with respect to the distributed action.

Now as I have at each of these --

THE COURT: But in the non-distributed actions it's not a class --

MS. MARCUS: That's exactly right.

THE COURT: -- right? Okay.

MS. MARCUS: And it's much simpler than for that reason.

THE COURT: It's much simpler. Okay.

MS. MARCUS: And fewer defendants as well.

THE COURT: Right. Right.

MS. MARCUS: Now as I have at each of the hearings before Judge Peck seeking to extend the stay I'd like to report on the benefits that the debtors have realized from the ADR process and the litigation stay and the SPV stay.

As indicated in the fifty-third status report filed on April 24th by my partner, Peter Broomburger (ph), as a result of mediation the debtors have achieved settlements in 328 ADR matters involving 435 counterparties,

generating in excess of two and a quarter billion dollars for the estates.

Another measure of success is that 147 out of the 158 ADR matters in Tier I that have reached the mediation stage have been settled. That's an astounding 93 percent success rat, and the work continues.

There are at least nine additional Tier I mediations that have been scheduled to commence between today the end of June and many more in the pipeline.

With respect to the avoidance actions specifically more than 123 defendants of the SPV actions currently are subject to the SPV ADR procedures.

As we've described in paragraph 5 of LBSF's opposition to JA Hokkaido Shinren's application to lift the litigation stay the 150 defendants in the non-distributed actions have almost all been dealt with. We have reached final resolution with over 133 defendants and there are pending ADR proceedings with respect to 15 defendants.

The distributed action, as Your Honor eluded to, is a bit more complicated. That matter is a defendant class action. The plan administrator has identified over 170 noteholders who have received in excess of $2.8 billion of distributions.

Notwithstanding the size and complexity of this action, as also described in paragraph 15 of the opposition,

the plan administrator has made substantial progress in this action as well. There are pending ADR proceedings with respect to 108 defendants in the distributed action. LBSF has conducted in-person mediation sessions with 31 defendants and has settled with and dismissed 23 defendants, and there are an additional 16 other defendants that we're working on settlements with.

The foregoing statistics demonstrate and I don't think anyone would agree that the ADR program has been a resounding success. Judge Peck has commented on numerous occasions. In February of 2013 he described the process as quote, "One of the most extraordinarily successful aspects of case administration in this massive case."

Absent the stay much of that success would not have been possible, particularly within this time frame and with so little burden on the Court.

And to be clear, Your Honor, although the litigation stay will expire soon the plan administrator intends to continue to utilize the ADR procedures and to resolve as many of these disputes as possible through mediation rather than litigation. We hope to be able to continue to resolve these matters expeditiously and to generate additional value for the estate and its creditors.

That concludes my presentation of the background, Your Honor. Before I turn the podium over to Mr. Defilippo

in terms of the calendar I wanted to point out that we will essentially be treating three matters together. Item 3, which deals with the proposed scheduling order, item 4, which is JA Hokkaiod's application to lift the litigation stay, and item 6, which is a motion filed in the main case by the group of 77 defendants in the distributed action which essentially is the mirror image of item 3.

THE COURT: Okay.

MS. MARCUS: Thank you, Your Honor.

MR. DEFILIPPO: Good morning, Your Honor.

THE COURT: Good morning.

MR. DEFILIPPO: Paul Defilippo for the plaintiff.

Your Honor, this case involves 47 SPVs, special purpose vehicles, which issued notes under indentures. LBSF was the provider of a credit default swap to each of the issuers and had priority to payment from the SPV assets, which we estimate total $3 billion at the time default was declared. Each of the deals had priority modification provisions which reversed payment priority on default. That's the so-called flip clause.

THE COURT: Right.

MR. DEFILIPPO: Each of the SPV trustees declared a default solely due the LBHI's Chapter 11 filing, implemented the priority modifications, liquidated the collateral, and distributed to the noteholders.

Defendants are the issuers, the trustees, and hundreds of noteholders individually, and as representatives of a putative class of noteholders who received the benefits of the priority modification provisions in the indentures or the distributions from one of the SPVs as a result of the enforcement of the ipso facto clauses.

The original complaint was filed within two years of the LBHI petition date, has been amended twice to add defendants and claims since then as LBSF was entitled to conduct discovery for the purposes of identifying as many noteholders as possible.

The case has been otherwise stayed for about three and a half years while the parties are engaged in the ADR process, which as Ms. Marcus noted as been successful thus far and which LBSF hopes will continue to be successful.

THE COURT: So let me ask what may be a stupid question. Is everything accounted for in terms of the distributions?

MR. DEFILIPPO: No, Your Honor.

THE COURT: I mean when you add everything up do you get the sum total of the distributions?

MR. DEFILIPPO: We have not --

THE COURT: Or are there still missing defendants in other words?

MR. DEFILIPPO: There are still absent class

members, yes, Your Honor. We think about 20 percent of the distributions.

THE COURT: Twenty percent in amount?

MR. DEFILIPPO: In the amount of about 400 million is the number I've been given are not accounted for by defendants who are in the case.

We've proposed an order to govern the procedures for the conduct of this action going forward, which we have suggested should take up class certification in Phase I, followed in Phase II by the statute of limitations and personal jurisdiction defenses, and then all other dispositive motions in Phase III. And the biggest bone of contention between the parties is the timing of decisions on the merits, and that's the issue with your permission I'd like to address first.

THE COURT: Okay.

MR. DEFILIPPO: The -- what we've called the group of 77 noteholder defendants plus two joinders proposes that motions to dismiss on the merits should go first, although they haven't specified what issues are susceptible for resolution.

THE COURT: Well so my guess on that, and I'll speak to them when they get up, but my guess on that is that that's going to be a series of motions that says why Judge Peck's ruling with respect to the flip clause doesn't apply

to them. Is the that a good guess?

MR. DEFILIPPO: That's a good guess, Your Honor, yes.

(Laughter)

THE COURT: Okay.

MR. DEFILIPPO: Of course. And before I specifically address why we don't think it's necessary for this Court to revisit Judge Peck's decisions I'd like to point out that we have cited numerous cases to Your Honor --

THE COURT: Well it's not -- I'm not going to, right? I mean that's law of the case. What I meant by that was that they would attempt to say why the exact words in the particular agreement at issue in their case are not the exact words that Judge Peck made a determination on in the Bank of New York case. And I'm not at all smart enough to know whether that makes sense or not, but that's just a guess.

MR. DEFILIPPO: But, Your Honor, that's exactly why it's wise to deal with class certification first, because those alleged distinctions that allow BNY and Ballyrock decisions to be challenged are the basis or the potential basis for what we've described in our papers as the one-way intervention problem.

In class procedure you can't have a merits determination before certification of the class if that will

permit absent class members or non-moving defendants to allege that they are differently situated than the moving party who has gotten a merits ruling.

So if you --

THE COURT: Right.

MR. DEFILIPPO: -- synthesize all the cases in our brief, including several from the Second Circuit, including that Jones versus Ford Motor Company case, Philip Morris Judge Wood's Cuzco (ph) versus O'Ryan (ph) case, they basically say if you have a putative class and there is something that you can raise that's an easy decision -- that's what the Curtain (ph) case -- the D.C. Circuit case says -- if there's an easy way to get rid of the whole case and moot class certification so you don't have to go through that process then by all means you have the discretion to do that. But they haven't identified a single issue that would moot the class certification process.

So, for example --

THE COURT: But one -- the -- yes, I agree with that characterization, although I would say that the JA Hokkaido -- I don't know if I'm pronouncing that correctly -- party is -- does raise an issue that I think merits specific focus, but --

MR. DEFILIPPO: Would you like me to go there?

THE COURT: You don't have to go there now.

MR. DEFILIPPO: Okay.

THE COURT: But as a footnote to your general pronouncement I've identified that as one potential issue that might merit stepping out of line so to speak and being heard.

MR. DEFILIPPO: Yes, understandable, Your Honor.

So to put that Author's Guild decision in context here, that was an example of the kind of rare occurrence that justifies taking merits determinations out of order.

If you can substantially narrow the claims of the class, and you know, most of these cases arise in the context of a defendant who's the subject of a class action, not a plaintiff who is seeking to hold the defendant class liable, and even though one-way intervention has mostly been applied to plaintiffs' classes it is equally pernicious if the defendants are able to utilize it against a single plaintiff. It has the same adverse consequence, and that's the reason for the inclusion in the rule of the early practicable time for the determination of class certification.

THE COURT: How long -- in your view if we were to go the route that you suggest how long do you believe the class certification process would take?

MR. DEFILIPPO: This may be over optimistic, but we should be able to conduct the discovery within four

months -- four to six months, and subject to Your Honor's calendar have hearings shortly after that.

THE COURT: So the suggestion that it would be 2016 before we got to motions to dismiss, kind of the third phase, you believe is --

MR. DEFILIPPO: Well, Your Honor --

THE COURT: -- is exaggerated.

MR. DEFILIPPO: -- you think that's exaggerated and it also fails to take into consideration that as part of the class certification process you must necessarily consider some merits issues in determining the commonality questions. So you will have plenty of opportunities to hear merits arguments in the class process, and you know, they may give rise to --

THE COURT: And would I have the ability to kind of pull people out of line during that process?

MR. DEFILIPPO: Of course, Your Honor, you have the inherent power to control your docket.

THE COURT: Okay.

MR. DEFILIPPO: We have attempted to show in our response, Your Honor, why the three points that the defendants have contended are appropriate for consideration. First, failure to state a claim on which relief can be granted. Statute of limitations and personal jurisdiction are not the kinds of arguments that are important enough to

justify departing from the general rule that class certification should go first.

We think if there are safe harbors to be litigated as affirmative defenses they don't appropriately get considered on a motion to dismiss, they may require discovery, they may require -- they will invariably require the Court to you look outside the pleadings, and several of the claims are not barred by any safe harbor. The declaratory judgment action, for example, on the applicability of BNY and Ballyrock is not barred, the imputed intent, 548(a)(1)(a) claim is not barred, nor is the 549 claim. So you would not terminate the litigation even by the application of a safe harbor.

We think we've adequately pled each of the claims and they meet the plausibility standard, especially in light of Your Honor's intent to respect Judge Peck's decisions. No contrary decisions on those points have been cited to the Court, so we think Your Honor would appropriately deny a motion to dismiss the DJ action on that ground.

The defendants in the Ballyrock case actually argue that the resolution of a flip clause required discovery. So I'm not sure whether you'll hear that argument from the defendants in this case, but if you do that also makes it inappropriate for resolution on a motion to dismiss. And if the defendants lose on that issue again

and are granted leave to appeal the resolution of the appellate process would fragment the litigation and probably bog us down interminably.

So holding that issue until later in the case allows the Court to rule on a full factual record, and even if you did depart from BNY and Ballyrock that does not eliminate the need for class certification.

With respect to the claim that some counts may be time barred. The original complaint was timely filed, we don't believe there are any statute of limitations defenses applicable to the declaratory judgment or state law claims, and once we file the original complaint and asked for a class we should get the benefit of American Pipe tolling which says the statute of limitations is tolled as to class until there's a decision on certification.

We also believe we could use 540 -- 550(f) for the avoidance actions and have the benefits in relation back under 15(c) to overcome statute of limitations issues.

And with respect to the claim that the Court may lack jurisdiction we have shown in the response to JA Hokkaido why we believe the Court has jurisdiction over absent foreign defendants. You have nationwide jurisdiction of course over all the defendants who are not foreign, no other defendant has come forward specifically to suggest it is similarly situated to JA Hokkaido, and we believe that

the points that we've raised in opposition to JA Hokkaido are meritorious and JA Hokkaido has not really answered them in its response. The --

THE COURT: But you just said that you haven't identified anyone else who's similarly situated.

MR. DEFILIPPO: To JA Hokkaido.

THE COURT: To JA Hokkaido.

MR. DEFILIPPO: Correct. And none of the -- none of the named defendants have suggested they are similarly situated either.

THE COURT: Right.

MR. DEFILIPPO: Whether class members may be similarly situated remains to be seen.

THE COURT: But none of the group of 77 has said that that's their situation.

MR. DEFILIPPO: That's correct, Your Honor.

One of the arguments that the group raises is that they have a due process right to prompt consideration of their motions to dismiss, but we submit that following Rule 23 and following the cases under Rule 23 that suggest that class certification should go first could not possibly give rise to a due process violation.

All but 14 of the defendants by the way were happy to delay resolution of this case for the last three and a half years, and we've cited two Court of Appeals decisions

that hold that a litigant does not have a due process right to have its issues heard at any particular time.

At bottom, Your Honor, the problem with the groups' approach is that the merits decisions, if made prior to class certification, are not necessarily binding on either non-participating named defendants or absent class members, and there are over 60 named defendants who are not part of the group of 77.

We will probably, although this decision has not been formalized yet, probably be asking the Court to certify at least the declaratory judgment aspect of this under the non-opt out provisions of Rule 23 so that should eliminate any concern that the defendants might raise that why would you bother certifying a class if we can opt out. Either under 23(b)(1) or (b)(2) we believe we can certify a DJ action under the non-opt out provisions, and there is case law support for the proposition that the DJ, the non-opt out portion of it should actually be heard first, especially if it's combined with injunctive relief.

So if you do certify all of the noteholder defendants will be bound to your decision on the DJ issue.

Under the liaison counsel point, Your Honor. Your Honor has the power to appoint an interim class counsel under the rule and we view that no differently than appointment of the liaison counsel.

As you have no doubt noticed the groups' proposed order only requires that they use best efforts to coordinate themselves, their submissions and their arguments, and we are hopeful that Your Honor will agree that some measure of control beyond best efforts is necessary here.

If the class is certified and class counsel is appointed Your Honor may or may not see fit to continue liaison counsel, you don't necessarily have to. So liaison counsel would probably only continue through the class certification portion. But it's a common feature of a multiparty complex litigation, and we actually took most of that section of the order out of the Tribune order.

If the individual defendants want to be heard on issues of importance to them our proposed order permits them to ask Your Honor for permission to do so.

They made some other requests in their order, Your Honor, I'd just like to address briefly.

THE COURT: Okay.

MR. DEFILIPPO: On the disclosures issues they have the contact information for each defendant who has been named in this case. It's a schedule to the second amended complaint. And additional disclosures we don't think are appropriate either on a one-way basis or at this time since under Rule 26 both sides are supposed to make that disclosure within 14 days after the initial conference,

which hasn't occurred yet, so we think it's premature for initial disclosures here, but to the extent there is additional information that the defendants want I think they're free to get it from the trustees, including pristine sets of deal documents if the defendants need them.

We think we should have the right to ask you for leave to amend, especially if after discovery we come up with new theories or want to additional defendants.

We strongly oppose termination of the ADR stay or the confidentiality restrictions for the reasons in our brief. The defendants don't need to terminate the stay, they can participate in each phase of the litigation that affects them. And without confidentiality we think we would not have been as successful in resolving claims in the ADR process as we have been.

As for the trustee's issues, Your Honor, they don't want to be involved in the class certification phase, but they will need to produce documents and maybe provide a witness for a deposition, depending on what the documents say.

If there's a substantive issue presented to the Court in the class certification phase I think they ignore it at their peril. They're parties to this litigation and there's no reason why they should have a second bite at the apple on substantive issues once Your Honor has decided.

Finally on JA Hokkaido, Your Honor --

THE COURT: Uh-huh.

MR. DEFILIPPO: -- is really pressing to make a motion to dismiss for lack of personal jurisdiction, and they allege that we have to plead facts establishing personal jurisdiction citing the Marine Midland case, but that case does not say that. It says we have to prove jurisdiction exists over them by a preponderance of the evidence after a hearing, which may be evidentiary and which may occur after discovery.

We're giving relief from the ADR stay to allow JA Hokkaido to present its motion at the time Your Honor rules that all such motions should be presented, and we have identified at least four basis for the exercise of personal jurisdiction over JA Hokkaido in our brief that we submit brings their motion within the scope of the general rule that class certification issues should go first and they should be allowed to bring their motion at the point in time when Your Honor determines that all personal jurisdiction motions should proceed.

We are sensitive to their complaints that they have to spend money to defend themselves, but they invested two billion yen in a synthetic CDO, and so we're not dealing with widows and orphans. They -- they invest money globally we believe, they invested money in a deal with an obvious

U.S. nexus, it was marketed by PPM and it was structured by Lehman, both U.S. companies, under Judge Lifland's decision. That is a significant factor in subjecting them to the jurisdiction of this court.

We don't contend the choice of law provision as dispositive, but it is an important factor to consider and the choice of law -- the documents provided that the choice of law in JA Hokkaido's deal was New York, they ignore the argument that the long arm of statute provides for jurisdiction over them, and they have no real response to our argument that since they received property of the estate Your Honor has jurisdiction over that property wherever it's located and you have in rem jurisdiction to require them to appear here and defend themselves.

So the strong defenses that we believe we have to the JA Hokkaido jurisdictional motion we believe brings this within the general rule as well, that class certification should proceed first, this motion should go in Phase II just like the group of 77 suggests.

And in conclusion, Your Honor, we respectfully ask that you enter our proposed order, deny the counter-order and the two motions that relate to it.

THE COURT: Okay, thank you.

MR. DEFILIPPO: Thank you.

THE COURT: All right, so who would like to be

heard next?

MR. BOCCUZZI: I would, Your Honor.

THE COURT: Okay.

MR. BOCCUZZI: Good morning, Your Honor.

THE COURT: Good morning.

MR. BOCCUZZI: My name is Carmine Boccuzzi, I'm from --

THE COURT: Spell your last name?

MR. BOCCUZZI: B as in boy, O-C-C-U-Z-Z-I. I'm from Cleary Gottlieb Steen & Hamilton, and I'm part of the group of 77, and in the interest of coordinating I was going to present the groups' part -- the arguments about the ordering of the phases.

THE COURT: Okay.

MR. BOCCUZZI: And then Mr. Blocker from Sidley Austin is going to discuss the liaison counsel issue and then other aspects of our order.

THE COURT: So let me start by telling what my concerns are, because what I see is a series of motions that would be filed by the defendants that would say don't apply Bank of New York decision, we're different, all right? And maybe there'll be 20 motions, maybe there'll be 40 motions, maybe there'll be 77 motions, and everybody will come up with some reason why they're different. And that's what you're suggestion amounts to in its most extreme form.

So when I (indiscernible - 01:08:18) that with the argument that oh, you can't do class certification first because then we won't get to dispositive motions until 2016 it doesn't make sense, I mean with the exception of something along the lines of the JA Hokkaido argument, which seems to be truly or at least somewhat unique.

My choices are do class certification for a group that certainly seems like a good candidate for class certification versus entertain a long series of motions that will need careful attention and that will inevitably delay.

So, you know, I'm presented with the peripheral rock in the hard place.

So the aspect of the proposed order that makes perfect sense to me is what I call the raise your hand to ask to get out of line provision. I mean if at any point you believe that there's something unique -- a defendant believes there's something unique at their situation they would always have the ability to make a letter request, you know, along the lines of what we do now with respect to a premotion conference saying, you know, now that we've gotten to this point, look, we're special, we want special treatment, and that could be considered, but that's enormously different from saying the very first thing we're going to do is have a couple a dozen 12(b)(6) motions, because then if I render one decision then the next one that

comes up it's going to be -- you know, I'm going to have to sort it into well is it like Bank of New York or is it like the other one?

And the analogy that I'll draw, it's not a perfect analogy, but as many of you may know there's a lot of litigation now over the scope of the safe harbor, 546(e), that's up at the Second Circuit, and in those cases, for example, a lot may turn on the precise nature of the plaintiff. Whether the plaintiff is a successor to the debtor, whether the plaintiff is standing in the shoes of the creditors, et cetera.

The reason I'm raising that is because it presents exactly the type of situation that I'm worried about here, that there will be these fine factual or structural distinctions that are raised as a basis for saying get me -- let me out of here, and that's why to be perfectly frank I believe that the order that's proposed makes more sense and will get you to a disposition more quickly, subject to the right to raise your hand to be asked to -- to ask to step out of line. So --

MR. BOCCUZZI: Just to address that concern.

THE COURT: Of course.

MR. BOCCUZZI: I mean I think if it's phrased as the parade of horribles, which is multiple 12(b)(6) motions by many different people --

THE COURT: Right.

MR. BOCCUZZI: -- I hear what Your Honor is saying as a matter of case efficiency --

THE COURT: Right.

MR. BOCCUZZI: -- and case management and timing; however, that's not what we're proposing, and we were hoping that the demonstrative exhibit of 77 of us putting in one response and putting in a proposed order that's very much in line with really the common practice, which is you use the 12(b)(6) vehicle to narrow or eliminate whole swabs of the case or the whole case is the best way to proceed.

And just to set the table --

THE COURT: So -- so what -- so hypothetically there would be a 12(b)(6) motion signed by 77 of you?

MR. BOCCUZZI: I think our goal is to deliver to the Court an efficient pleading, because we also recognize it's in our interest if you bombard a court with tons of motions to dismiss I think the judicial reaction is often well there's got to be some issue here and you just get yourself into a denial situation.

And to take a step back this is not just an exercise in crossing our arms and saying, you know, put Dante aside and ignore it. This case has ten additional causes of actions that were not in Dante and that really bring to the fore threshold legal arguments.

So there are at least four or five quasi contract claims, which under the clear case law in this circuit and I think most other jurisdictions, quasi contract laws don't live if you have agreements -- written enforceable agreements. The court's not going to create something when you've got something. So that's one set.

You have two breach of contract claims that are unique to one of the CDO's, depicts a structure, never dealt with before, breach of contract claim, probably disposable on a 12(b)(6) motion to dismiss.

And then you've got --

THE COURT: But -- so what you're saying may well work hypothetically with respect to the 77, but what do I do about the folks who aren't here, then what?

MR. BOCCUZZI: Well the folks who aren't here it's a bit of a hypothetical, Your Honor, because they've been looking for four years. Part of this -- the reasons for these stays wasn't just so they could have their ADR procedure --

THE COURT: Sure.

MR. BOCCUZZI: -- it was so they could find the folks who got the money. And to the extent they haven't found them yet it's a real question whether these people will ever be found, will ever come forward, or will every get the proper notice that if there is a class judgment

they'll say I'm not bound by this, I never heard about this, I never had the proper notice. They really want to create a --

THE COURT: Well there are -- I mean there are ways that I can skin that cat, that's not -- I mean there are ways to deal with that, so that doesn't really work.

As an answer you have the real risk that other people are going to come in after your, you know, dispositiveish motion and then I'm going to have to do it again multiple times, and to the extent that there are causes of action that -- what you're talking about is trimming as opposed eliminating.

MR. BOCCUZZI: And I would also add, Your Honor, though for many of these CDOs they had different contractual language then the Dante case, and so the Dante case number one, whether it was really framed as a -- to use their term -- the flip clause, the documents have different language which support arguments that it was not a flip clause.

And number two, in Dante the judge was very clear that in that structure the swap agreement made no reference to payment priority and that's how we dealt with the 560 argument.

THE COURT: But then -- but then we get to a position, where as counsel said, in the process of the class certification procedures and determining commonality if it

emerges -- if a subgroup emerges that has that argument we could off ramp them and deal with it. I mean we have -- I have the inherent ability and flexibility to deal with those issues as they arise.

The -- it seems entirely clear me that number one it's not inconsistent with due process rights of the defendants to proceed the way the estate suggests, subject to reasonable flexibility on my part to let people engage in some bespoke procedures when they identify something that entitles them to it. But if I flip it -- no pun intended -- if I flip it and I have, you know, the very first thing is threshold dispositive motions it's not going to -- it's not going to move forward as quickly.

MR. BOCCUZZI: But then, Your Honor, we get to the case law. So the Author's Guild case says very clearly -- there they actually reversed a class certification, the Second Circuit being they, where they said in this case class consideration would be informed by or perhaps mooted by issues -- consideration of the threshold legal questions, and that fed off of the McLaughlin case, which is not cited in our papers because I think this issue got sharpened in their reply, but that's another Second Circuit case, 522 F.3d 215 and the Flag Telecom case, also the Second Circuit, 574 F.3rd 29 which say that where something doesn't state a claim those issues shouldn't be certified.

So at the very -- at the very least -- and one other point which is most of their case law all predates the 2003 amendment to Rule 23. Rule 23 used to have very clear language that said as soon as practicable after the commencement of the case, in 2003 that was amended to say at an early practicable time. And the advisory committee notes are very interesting because they say changing this language comports it with actually what happens and how parties proceed.

And I point out the leading 12(b)(6) case, the Twomble case, was in a non-certified class action where the Supreme Court reversed a denial of a motion to dismiss by the Second Circuit all before the class was certified there. And it also says this language allows the court where defendant -- if the court has good reasons to entertain motions to dismiss to let that happen. I think they say summary judgment. Because even then most of their cases the courts grapple with -- I'm sorry -- summary judgment before or after class certification. We're even more threshold and earlier than that, we're at the motion to dismiss stage, and when you have --

THE COURT: But are you suggesting that you're going to tender a motion to dismiss that's fully dispositive of the 77's claims? That it's going to knock out every single claim?

MR. BOCCUZZI: I think our motion, yes, could knock out everything, and if not everything certainly -- because then you get to questions of how does this relate to class certification? Typicality? It could knock out certain defendants, it could knock out -- I mean -- yeah, defendants, it can knock out certain CDOs.

And so what they're saying is do class certification first, do 12(b)(6) -- because they're not saying don't do 12(b)(6), they're saying --

THE COURT: Right.

MR. BOCCUZZI: -- do it after, and then they say, oh, so if things change then revisit class certification, but that can't be efficient and effective if only because they're immediately adding in a new issue by saying no 12(b)(6), which is -- their argument is while all this time is running they continue the collect in their view nine percent statutory New York State interest on everything. So that's going to be another issue we all have to litigate, and that can't be consistent with the rule one fair, efficient, inexpensive adjudication to add issues.

THE COURT: But if we can hypothesize that class certification being done, it's May of 2014, if we can hypothesize that class classification would be done by January 1, 2015 and you all then will have -- you can file your dispositive motion the next day and you will then have

had the benefit of everything that comes out during the class certification process in order to fine tune what you have to say.

I'm just not seeing the prejudice to the defendants in proceeding with the class certification and then promptly -- promptly thereafter filing your is it (b)(6). I'm just not seeing it, because there's -- if you were to file a 12(b)(6) soon, by the time you get done briefing, by the time you get done argument, and even if I didn't have the rather hefty queue that I have at the moment you're -- you know, January 1 is just -- you're not going to have a disposition of something of that magnitude.

So if the goal all working together is expedition and efficiency in my mind you get there -- you all get this faster at less cost with no prejudice to anybody's rights by doing essentially in parallel process. Doing the class certification and then being ready the next day to tender your 12(b)(6), and then we have the advantage of having the class in place and removing the specter of the multiple do-overs for the people who aren't part of your 77.

MR. BOCCUZZI: Just to speak to that, Your Honor. I think the 77 signed the brief, but there are more than that, about 200 something who are named.

THE COURT: Right.

MR. BOCCUZZI: To the extent they're named and

they're here, I mean if they don't file their 12(b)(6), you know, you have them, I don't think they can create a do-over situation for you. They're named defendants in this case. And so if Your Honor set a schedule that said -- the only specter that they try to muster about the do-over are the --

THE COURT: Oh, but that's even --

MR. BOCCUZZI: -- people they haven't found.

THE COURT: Right. But that's even -- but that's even worse. So if I have the -- the 77 file their 12(b)(6) and then the others -- the found but not 77, right, so there's three buckets. There's the 77 -- I'm simplifying.

MR. BOCCUZZI: Yeah.

THE COURT: Then there's the found but not part of the 77, right, and then there's the unfound. So we're at risk with respect to the latter two categories.

So what your --

MR. BOCCUZZI: No, no, because the order we're proposing says parties in this -- the defendants will file their 12(b)(6) motion by X date.

THE COURT: Right.

MR. BOCCUZZI: That's everyone, it's not just us 77.

THE COURT: Right.

MR. BOCCUZZI: So they've got --

THE COURT: So --

MR. BOCCUZZI: -- if they don't file it they haven't file a 12(b)(6) motion, and --

THE COURT: Right. So -- right. So hypothetically if the 77 act together --

MR. BOCCUZZI: You have one motion.

THE COURT: -- I get one --

MR. BOCCUZZI: Uh-huh.

THE COURT: -- plus 200.

MR. BOCCUZZI: But why would the --

(Laughter)

MR. BOCCUZZI: -- why would the 200 people who didn't even file anything today do that? Just to harass Your Honor? I just -- they have to have a showing that these people are particularly litigious who are unpleasant, but I just don't -- I just -- I think that's --

THE COURT: Well but why -- but if they --

MR. BOCCUZZI: -- that's a kimera (ph).

THE COURT: -- if they've chosen -- they've chosen not to join with you so they've adopted, you know, the laying the weed strategy, which is their right, okay, and then when the Court enters an order that says now is the time to step up I think it's a fair guess, maybe not 200 but some of them are going to step up, so --

MR. BOCCUZZI: Again, Your Honor, I just don't -- I just don't see that happening. I just think again they

don't have an interest in doing that, we don't have an interest in their doing it.

THE COURT: So what do you think --

MR. BOCCUZZI: If anything you'd get breached and maybe just join our brief so that's just -- then you keep saying me too. That's not -- that's not a burden to the Court, that would be efficient.

I mean on the class certification point I would add I think he said optimistically four to six months of class discovery, that gets us to the end of this year. We're in June, May/June, right, yeah, it's six months till the end of the year and he said that was optimistic, then they've got to finish collateral estoppel discovery, right, and so you're in January and they haven't -- we haven't finished briefing class certification.

So I think at most --

THE COURT: My timetable is more aggressive than yours.

MR. BOCCUZZI: More than his, but he's saying he needs at least four to six months of class certification discovery.

But putting -- but putting that aside again I think at the very least then if we want to be efficient -- and remember the prejudice to the defendants just to -- because you were trying to --

THE COURT: Uh-huh.

MR. BOCCUZZI: -- find the prejudice. The prejudice to us is we are in the ADR process, this is an odd situation where plaintiffs are saying let's move slowly on the merits, and the reason why is clear, it's because they want to continue to use the Dante case, which they see as favorable precedent in that -- in the court order mediation process as leverage, which Judge McMann said in that settlement process.

So I think it's fair at this point that the case is starting up again for us to say, no, both for Your Honor and in this mediation process, which everyone is participating in good faith, look at this, they have 12 claims, 6 of them fall away under basic contract principals. The avoidance claims -- the 549 doesn't even apply because this is not a post-petition situation because it's different from what happened in Dante. And in the safe harbors otherwise cover the preference claim and the other theories.

So it's very real prejudice for us to embark. If it's going to be a fair ADR process and we're now in the litigation why not let us get on the table the issues that go to the legal merits here, and --

THE COURT: I was following you until you made the an nexus to the ADR process. Why does the order of class certification versus 12(b)(6) practice affect the fairness

and utility of the ADR process?

MR. BOCCUZZI: Because -- because now the stay is being lifted, we are starting litigation --

THE COURT: Right.

MR. BOCCUZZI: -- we've waited through the period of the stay --

THE COURT: Right.

MR. BOCCUZZI: -- and so now it would be fair for the defendants here to be able to present their defenses both as to claims that have never been looked at by this Court and also to explain why they're different from the Dante case. Otherwise we're in a regime where we're just living as if that's the rule of the day.

And I would just to put a marker down, I don't know if law of the case solves it for them because we weren't in that case. That was an adversary proceeding. And so just following, you know, we're now in the land of the 7,000's --

THE COURT: Well law --

MR. BOCCUZZI: -- from --

THE COURT: Right, but law of the case is different from being estopped -- collaterally estopped.

MR. BOCCUZZI: I understand that, but it's usually -- I think all the case law applies it in the context of a case, and a case is understood by the federal rules, which

is here our case, not the case that we were not involved in. It's a rule so judges aren't bombarded by the same party saying, oh, revisit this issue. And say well wait, you've been here, I decided this, let's move forward, counsel.

So I don't think the law of the case paradigm works for them.

I mean I think at the very least, Your Honor, and I'm surprised they haven't potentially suggested this, is maybe the way to skin the cat would be to have 12(b)(6) and class cert go together, and so you're raising the legal issues --

THE COURT: Well but that's -- that's in essence what I was -- that's in essence what I was suggesting that they proceed in parallel and you get -- you're going to get to the finish line at the same time --

MR. BOCCUZZI: Well, I had understood --

THE COURT: -- on those issues.

MR. BOCCUZZI: -- I had understood what Your Honor is saying is you do class certification after the class certification is decided one way or the other then you have a 12(b)(6) motion.

THE COURT: Well but you're -- you're maybe improving upon what I was thinking, and to the extent that they could proceed in parallel so that when we get to class certification it's -- we've certified -- we've certified the

class but with a leaner and meaner scope.

MR. BOCCUZZI: Right.

THE COURT: I mean --

MR. BOCCUZZI: I mean at least --

THE COURT: -- that to me would be -- that would be perfect, right? That would be perfect. That would address everybody's legitimate concerns. It would deal with the fact that I don't think that you've said that all 77 can get out on everything, you've identified some causes of action that you believe, your words, clearly should go. I mean I express no view on any of that yet.

MR. BOCCUZZI: I understand.

THE COURT: And it would also satisfy my concerns about the other 200 and the unfound, because I do not want multiple bites after the apple and I do not share your optimism about the conduct of the two --

MR. BOCCUZZI: I was so proud of what we've done, Your Honor, I mean --

(Laughter)

THE COURT: I am --

MR. BOCCUZZI: -- proposed order, 77 folks, and not a lot of other --

THE COURT: I am very proud of you too.

MR. BOCCUZZI: Thank you.

(Laughter)

MR. BOCCUZZI: Sorry.

THE COURT: No, it is an achievement to see signature pages that have that level of cooperation, all -- you know, completely seriously, but I can't guess as to what other parties who haven't joined the group are going -- are going to do, and then we have the issue of -- you know, the liaison counsel and we need to have the ability to have the group continue to work together.

So I mean it just seems to me -- I'm a big fan of smart people working together to work things out -- it seems to me that there's still room here for this conversation to continue and I'm happy to participate in it with you to try to come up with some tweaks that would help address everybody's concerns. I do think as I've said a number of times now that I think that something unique like the JA Hokkaido situation, you know, deserves to step out of line.

MR. BOCCUZZI: And I believe there are folks in the group of 77 who have personal jurisdiction defenses.

THE COURT: Well they haven't -- haven't been raised yet.

MR. BOCCUZZI: Right. The idea was to say they would raise it at either Phase I or Phase II --

THE COURT: Right.

MR. BOCCUZZI: -- depending on how -- which would come first --

THE COURT: Right. But I --

MR. BOCCUZZI: -- before the class cert.

THE COURT: That personal jurisdiction defense in my mind is separate from 12(b)(6) and/or statute of limitations type issues on the other hand. Just the way I compartmentalize it.

So -- so I guess the question is do you think it would be worthwhile continuing to have some conversations to try to meld your concepts and see if you can come up with something that both sides could live with?

MR. DEFILIPPO: Could we have a few minutes to discuss that, Your Honor?

THE COURT: Sure. Ms. Marcus, I'm trying to think of what I have next. I think the only -- well, I have the -- I have the non-distributed, right?

MS. MARCUS: That will take five minutes.

THE COURT: That will take five minutes. And then I have the --

MS. MARCUS: Claim objection.

THE COURT: Yeah, I have the Newport Global. Those are the only two other things, right?

MS. MARCUS: That's correct, Your Honor.

THE COURT: So should I keep going and then some folks can go use the conference room and keep talking? What makes the most sense?

MS. MARCUS: Your Honor, I thought if we could have a couple of minutes to consult with our clients --

THE COURT: Sure.

MS. MARCUS: -- before we decide whether to do that. But in the meantime if you'd like we can handle the non-distributed, that will really just take a few minutes and there are a couple of attorneys in the room --

THE COURT: Okay.

MS. MARCUS: -- to whom this pertains.

THE COURT: So why don't we do that.

MS. MARCUS: Maybe you can go talk and I'll just zip through that.

THE COURT: Okay. Okay. That sounds good.

MR. LODEN: Your Honor?

THE COURT: Yes.

MR. LODEN: My name is Steven Steve Loden, I'm here on behalf of JA Hokkaido.

THE COURT: Yes.

MR. LODEN: I just want to make sure you're aware we are --

THE COURT: Very good.

MR. LODEN: -- (indiscernible - 01:32:04) and when you feel it's appropriate I'm happy to address whatever questions --

THE COURT: Well so far I've been making your

arguments for you, so.

MR. LODEN: You have, Your Honor, and I've been silent.

THE COURT: Okay, good.

Ms. Marcus?

Perhaps -- perhaps this group could --

(Court confers with clerk)

THE COURT: If you don't need to listen to what Ms. Marcus is going say perhaps you could go into a conference room or out into the hallway.

(Pause)

THE COURT: They need to have t-shirts that say 77 on them I guess.

MS. MARCUS: We had a joke that we were going to use in the other courtroom, which was the jaws, we need a bigger boat joke.

THE COURT: We need a bigger boat. I've actually -- I've made that joke. I've made that joke in some of my --

MS. MARCUS: But you mooted it by changing rooms.

THE COURT: I did. I made that joke in (indiscernible - 01:33:28). I think on the record.

MR. COHEN: I think you did.

THE COURT: I think I did. I think I said at one point we need a bigger boat, and sadly there are some who

are so young they don't get the joke.

MS. MARCUS: That is sad.

THE COURT: Isn't that sad?

MR. COHEN: I did get the joke.

THE COURT: You did get the joke.

MR. COHEN: I did get the joke. I have a gray hair to prove it.

MS. MARCUS: Okay.

THE COURT: Okay.

MS. MARCUS: Matter number 5 is the scheduling conference with respect to the five non-distributed deals as we've called them.

THE COURT: Right.

MS. MARCUS: While there's as we talked about earlier a certain amount of overlap between the issues in the distributed action and the issues in the non-distributed actions there are fewer issues in the non-distributed actions.

THE COURT: Right.

MS. MARCUS: As Your Honor eluded to there are no class certification issues.

In addition with respect to the non-distributed actions it's not clear whether they'll ever be litigated because the plan administrator continues to settle with various defendants, and from time to time you'll see on the

docket we file notices of dismissal --

THE COURT: Yes.

MS. MARCUS: -- as we settle these out.

THE COURT: Yes.

MS. MARCUS: On the other hand the defendants in the non-distributed actions want to make sure that their rights are not prejudiced if the Court gets to the point of hearing dispositive motions in the distributed action.

The plan administrator has consulted with counsel for several of the defendants in the non-distributed action and we believe that there's general agreement that the scheduling will be handled in the following manner.

The plan administrator will file a proposed scheduling order within two weeks of the Court's entry of a scheduling order in the distributed action. The parties' intent is that the scheduling order will mimic the schedule in the -- excuse me -- the scheduling order in the distributed action. And then the defendants in the non-distributed action will have 14 days to file written objections to the proposed scheduling order. And the plan administrator and the defendants will have a certain period of time to try to resolve any issues regarding the proposed scheduling order.

If the parties are unable to agree on the terms of a proposed order then the dispute will be set for a hearing

before the Court.

THE COURT: So let me just understand that. So that it really has to do with what ultimately will be the timing of dispositive motions?

MS. MARCUS: I think that's -- that's right, Your Honor.

THE COURT: That's going to be the -- that's going to be the main thing, right the main driver?

How are you, Mr. Schaffer?

MR. SCHAFFER: Good to see you, Your Honor.

THE COURT: Good to see you.

MR. SCHAFFER: Eric Schaffer Reed Smith, here for Bank of New York Mellon.

We are in the distributed and the non-distributed. For purposes of the distributed we're part of the group of five indenture trustees, some, but not all.

THE COURT: Okay.

MR. SCHAFFER: For purposes of the non-distributed I think there are fewer of us. To make it easy I agree with her.

(Laughter)

THE COURT: Okay.

MS. MARCUS: And, Your Honor, for Your Honor's benefit essentially most of the defendants in the non-distributed actions are represented -- the trustees in those

matters are either Bank of New York Mellon --

THE COURT: Okay.

MS. MARCUS: -- or U.S. Bank, and Mr. Top is here on behalf of U.S. Bank.

THE COURT: Okay. So the proposal is that you're going to enter an order that says what you said --

MS. MARCUS: Yes.

THE COURT: -- and then we're going to wait and see what happens in the distributed action, and then if you can agree on a mimicking procedure you'll present -- you'll file that on presentment, and if not we'll all come back and get together again.

MS. MARCUS: That's exactly right.

THE COURT: Okay.

MS. MARCUS: And in the interim the litigation stay with respect to those actions would be continued.

THE COURT: Would be continued, right.

MS. MARCUS: And I have a form of proposed order.

THE COURT: That's signed off by everybody?

MS. MARCUS: That Mr. Top and Mr. Schaffer have signed off on.

THE COURT: That's great. Okay.

MS. MARCUS: And I'm happy to hand it up, it's literally three paragraphs.

THE COURT: Okay.

MS. MARCUS: We have the time. Especially when they get back, maybe we can save some time.

THE COURT: Okay.

MR. TOP: Just real briefly. You know -- Frank Top on behalf of -- from Chapman and Cutler on behalf of U.S. Bank national association, as trustee, and we actually filed a former -- a formal response just to try to keep these cases, you know, in tandem, because we don't want --

THE COURT: Sure.

MR. TOP: -- one side prejudiced over the other.

THE COURT: Okay.

MR. TOP: And we're in agreement with the --

THE COURT: Okay.

MR. TEP: -- proposed orders.

THE COURT: All right. Very good.

Okay, so you can just -- I'll take a copy, Ms. Marcus and then you can -- you folks can just email -- email it or drop off a disk. Thank you.

MS. MARCUS: And for the benefit of Mr. Top and Mr. Top and Mr. Schaffer and Mr. Pedone, the only thing I did -- I had circulated it yesterday to them, all I did this morning was take off the draftee.

THE COURT: Okay.

MS. MARCUS: So there have been no changes made.

THE COURT: Okay. Terrific, wonderful. Thank you

all. Thank you very much. Good to see you.

All right.

MS. MARCUS: Should we turn to the --

THE COURT: Should we do --

MS. MARCUS: -- claim objections?

THE COURT: -- to the claim objection and then we can wrap up with --

MS. MARCUS: Sure.

THE COURT: Yeah.

MS. MARCUS: That will be handled by Turner Smith of Curtis, Mallet.

THE COURT: Okay.

(Pause)

THE COURT: So this is a so-called sufficiency hearing, correct?

MR. SMITH: That's right, Your Honor.

THE COURT: Okay.

MR. SMITH: And just for the record Turner Smith with Curtis, Mallet-Prevost, Colt & Mosle, we are conflicts counsel to LBHI.

THE COURT: Okay.

MR. SMITH: So as Your Honor knows we're at the sufficiency hearing stage, the motion to dismiss standard will apply, and I know you've had a chance -- or I hope you've had a chance to look at the -- the briefs that were

filed, but just to put you very quickly into the picture.

This is a classic third-party beneficiary structure, we've got party A and party B contracting, and party C then steps up and says --

THE COURT: Right, so those parties --

MR. SMITH: -- I want the benefit.

THE COURT: -- in this case are LBI and the funds.

MR. SMITH: Yes. The prime brokerage agreement --

THE COURT: Right.

MR. SMITH: -- is the agreement that we're focused on.

The claimant is third-party beneficiary is neither the funds or LBI but it's the advisor to the fund.

THE COURT: Right.

MR. SMITH: Newport Global Advisors. And as we've pointed out in our papers I think the name say it alls. They are simply an advisor to the funds.

Now they started this claim process with a $4 million claim and that claim was for lost management fees.

THE COURT: Right.

MR. SMITH: The underlying dispute by the way is that there was an order entered -- there was an order made or request made to LBI to transfer securities to Credit Suisse.

THE COURT: Right.

MR. SMITH: Somehow that got bottled up, the petition is filed or administration commences, and the securities are whatever --

THE COURT: Right.

MR. SMITH: -- they're gone.

The loss then claimed by the advisor is those securities, had LBI not breached its obligations, those securities would be in the fund and I would be earning my --

THE COURT: Right.

MR. SMITH: -- management fees. A very peculiar and very remote and contingent form of third-party beneficiary claim.

The -- that was a $4 million claim, well that's now ballooned to $30 million --

THE COURT: Right. With the --

MR. SMITH: -- and they've tacked on another claim, entirely different claim. That claim is a $70 million claim, and it says in 2008 when this whole problem arose we are poised to be acquired in some fashion. Now they don't say who was the acquirer or what the terms are going to be or is anybody ready, willing, and able to do it, they just say we were poised to be acquired and because we didn't have the securities there we -- the transaction fell apart so $70 million, that's what you owe. They don't

explain how we get to that number.

So let's then step through the traditional third-party claimant -- third-party beneficiary analysis. The -- it's a three-part test, the first is, is there a contract? Yes, everybody agrees there is.

Second, is this beneficiary a primary or direct beneficiary in the parties' -- A and B parties here?

THE COURT: Right.

MR. SMITH: And clearly they are not.

THE COURT: Right.

MR. SMITH: And in fact there is a provision in the agreement, the prime brokerage agreement by which the advisory firm, the claimant here, signs on --

THE COURT: Signs --

MR. SMITH: -- solely --

THE COURT: -- solely as to ERISA.

MR. SMITH: Now solely is not just to product NGA, it's to protect LBI. It knows now that it's not dealing with that advisor with whatever duties it might otherwise owe to a customer.

So in that sense we think we've eliminated any notion or any argument that there's a direct beneficiary here. Otherwise the contract is completely silent as to the existence of an NGA or obligations that might be owed to NGA, and so that is again one of the tests for third-party

beneficiary, is there anything that you can point to within the four corners of the agreement that would establish that the parties actually intended to (indiscernible - 01:42:38) this benefit. Clearly they did not.

So NGA falls to the general circumstances, and they say at paragraph 43 of their response, well look, LBI knew that we were the advisors and LBI was they say on notice. I'm not sure why they say that, but it's LBI must have been on notice that Newport Global Advisors would be earning a fee that was tied to whatever the --

THE COURT: Well in fact it's a little -- it's a little more loose than that because it's -- Lehman was well aware, LBHI in particular knew. I mean it migrates --

MR. SMITH: It does migrate, and --

THE COURT: It migrates.

MR. SMITH: -- you know there's a very interesting fact here. They never filed this claim against LBI to my knowledge in the LBI estate.

So they've come up with this claim late, they've inflated it, tacked on another unrelated claim, and brought it against LBHI under some theory of guarantee or whatever, but that -- we don't have to reach that issue at this stage of the proceedings, because we can get rid of it at this stage of the proceedings, a merits hearing is not going improve their -- their pleading.

The -- so the $30 million, claim which is the lost management fees, the only fallback position they can argue for is that somehow the general circumstances, which we were just talking about, compel the conclusion that they were an intended beneficiary. The case law is against them on that.

We've cited the Court to two Southern District cases, one of which is essentially this situation where the investment manager is saying -- is saying to the broker I was going to be benefited under this provision -- under these -- this contract performance and therefore I'm the third-party beneficiary. The court says, no, they say no in that context, and the Southern District in the Foundation Ventures says similarly with a -- in that one it was a fundraiser for who was going to issue shares -- he was going raise money and then issue shares through a broker/dealer. The broker/dealer says, since that primary agreement failed, I, as a broker/dealer, lost the opportunity to participate in that initial offering.

The only cases that they cite to are easily distinguishable. These are cases where party A and party B knew that their performance was going to be for the benefit of party C.

So you have a supplier of building materials to a builder, well they both know that it's going to be installed, the subject of the agreement is going to happen

at party C's level. Same thing with an architect who contracts with a subsidiary, he knows it's going to the parent.

So on that basis that $30 million is purely incidental type of a relationship and third-party beneficiary rules wouldn't apply.

On that $70 million claim, which really comes out of left field, this is a -- the claim that there was a transaction that failed or lost a business opportunity because Newport didn't have the securities in its account and supposedly that aborted a transaction.

Well that claim is logically impossible to assert on the basis of a 2006 agreement, because the transaction they're talking about didn't fall out of bed until 2008, and it's impossible for LBI to have known that they're some time two years into the future that there would be a transaction pending and that that -- that that transaction or to benefits of that transaction should somehow be preserved or indemnified or insured on behalf of this Newport Global Advisors.

Two other arguments and then I'll step down.

There is a limitation of liability clause in the prime brokerage agreement. Case law tells you that the third-party beneficiary who claims a right as a third-party beneficiary also takes on the burdens of being a party to

the contract, and the principal contracting parties can assert and argue the defenses that would normally apply.

The limitation -- there are two forms of the limitation of liability. Part one is that you can only plead gross negligence. There's an exclusion for any other kind of conduct. There is no pleading of that here and the circumstances that I just described where these securities get locked up is not a gross negligence event.

The second preclusion is consequential damages. There's a very broad and very traditional no lost profits, no incidental, no consequentials.

What we're talking about I think is obvious because as we've just discussed in eliminating a third-party beneficial link or the incidental link is truly a foreign consequential damages. So they're going to be knocked out on that.

And then finally if you were to allow them to push that one step and that second step, third step forward they bump up against the Kenford rule, which is that these damages are speculative in nature. You'd have had to reconstruct based on a series of hypotheses and assumptions about what securities would have been in the pool that they would have been able to manage or what fees they might have earned and what alternatives there may have been available to them. That's impermissible or it's incapable of being

determined with reasonable certainly, and the Kenford line oaf cases tells you, well that's -- you can strike the claim on that basis.

So for those reasons I think we've beat the claim at the sufficiency hearing level, we'd ask that the claims be expunged in their entirety.

THE COURT: All right, thank you.

THE COURT: Good afternoon.

MR. STEEL: Good morning -- good afternoon, Your Honor. Howard Steel of Brown Rudnick on behalf of Newport Global Advisors.

One correction to the comments of Mr. Smith. The parties to the underlying agreement are not only LBI and the funds but it's all the Chapter 11 debtors, therefore these claims are brought against all the Chapter 11 debtors. There's actually 19 proofs of claims pending in this objection.

THE COURT: Who is the prime brokerage agreement with?

MR. STEEL: It was with LBI and all of Lehman, and it also named parties, Lehman Brothers Holding Inc., Lehman Brothers Special Financing, and all their affiliates and subsidiaries. So it's our position that each of the Chapter 11 debtors are counterparties to the prime brokerage agreement. The prime broker was LBI.

THE COURT: The prime brokerage agreement, is there a copy attached anywhere?

MR. STEEL: Yes, it's attached to the May declaration which -- at Exhibit A, Your Honor, to the May declaration, docket 44071.

THE COURT: Customer account agreement prime brokerage?

MR. STEEL: Yes. And it's Section 1, Your Honor, the parties' disagreements shall consist of Lehman Brothers Inc., Lehman Brothers International Europe, Lehman Brothers Finance, and it goes on.

(Pause)

THE COURT: Okay. So that's on the Lehman side of things, but on the Newport side of things there's no dispute that your client is not a party to these agreements other than in the limited capacity in which it signed, right?

MR. STEEL: Well yes, they signed for the ERISA representation, and it's our position that we're a third-party beneficiary.

THE COURT: As a result -- so it's your position that as a result of signing the ERISA representation you became a third-party beneficiary of the entire agreement?

MR. STEEL: No, Your Honor, that's not our position.

THE COURT: Okay.

MR. STEEL: Our position is we're a third-party beneficiary under the four corners of the agreement -- and I'll present that to Your Honor -- and also because Your Honor is permitted, contrary to Lehman's representations, to look at extrinsic evidence, to look at the surrounding circumstances of entry into the agreement, we believe that the facts set forth in the May declaration are very sufficient at this sufficiency stage hearing to have a plausible claim of third-party beneficiary given the surrounding circumstances of Newport entering into this agreement. And I'll dive into that depending on where Your Honor would like me to start addressing these issues.

THE COURT: Well, I think you should start with the fact or with my telling you that I agree with Mr. Smith's road map in virtually ever respect, so you're going have to persuade me why he's wrong.

MR. STEEL: Sure.

THE COURT: And in particular signing the ERISA representation does lend additional and particular support I think to the argument. I mean if your client was -- entered the picture then it is clearly only in that -- in that respect.

So I guess you should just go down the arguments --

MR. STEEL: Let me navigate the road map.

THE COURT: -- and try to convince me.

MR. STEEL: Yeah, let me start with the ERISA signature. I believe that's a required signature from the investment manager under the ERISA statute.

THE COURT: Okay.

MR. STEEL: It's not dispositive of the parties' intent --

THE COURT: Okay.

MR. STEEL: -- who to benefit under the agreement --

THE COURT: Well, do you agree that I start with the four corners of the document?

MR. STEEL: I believe that under the cases we cited, Foundation Ventures that Mr. Smith cited, Fishteen versus Miranda (ph), Vista versus Columbia, US versus Ogden Lotts (ph), you look at both the agreement, and you can also look at the surrounding circumstances.

THE COURT: But I -- when I went to law school, right, you -- before you went into extrinsic evidence you had to find an ambiguity, right?

MR. STEEL: Yep.

THE COURT: That's still good -- that's the way it works, right?

MR. STEEL: And I appreciate that, and I did research on that, and I'm looking at the research results in

the cases that I just cited to you --

THE COURT: Okay.

MR. STEEL: -- the Court did not consider the issue of ambiguity of the contract terms first. It just said --

THE COURT: Well, let me --

MR. STEEL: -- on when valuing third party beneficiaries, so.

THE COURT: Well, I mean, here's the distinction that I draw. I mean, you don't -- it's not that I have to be a robot, right, and just do a word scan of the document, right. You read the document in the context. But that's different in my mind from affirmatively bringing in extrinsic evidence.

So the context here is that your clients and advisor to these funds, these funds contract with Lehman to be the prime broker, and that's it. I mean, that kind of sets the context of the document, and there's nothing in the document that specifically says or even suggests that the advisor has any rights under this agreement.

MR. STEEL: Well, that's why I think that the road map makes Your Honor compelled to look at the surrounding circumstances too, in addition with what the agreement says.

And I point Your Honor to Section 21 of the prime brokerage agreement. And I believe that this demonstrates

an intent to not only benefit the funds, but also the investment manager.

THE COURT: Section 21?

MR. STEEL: Yep.

THE COURT: Okay.

MR. STEEL: And what Section 21 says -- if I may, Your Honor.

THE COURT: Sure.

MR. STEEL: Section 21 basically says that LBI will act as a prime broker, will set up accounts in Lehman under your name, accept for clearance and settlements of trades via your broker operate, it'll follow your investment manager's instructions.

What this sets up is an agreement to be a functional operating prime broker. All right. So when you view this language in the light most favorable to the advisor, which you're required at the sufficiency, it indicates a benefit to NGA.

Because you've got to look at the other surrounding circumstances to when Newport and Lehman entered into this agreement, and what this claim that we're seeking to assert involves.

NGA's total --

THE COURT: Wait, I don't understand that. How does this -- how does what you just read to me indicate that

this is for the benefit of the claimant?

MR. STEEL: Yeah, because the investment manager is responsible for the fund's investment decisions and operations, okay.

THE COURT: Right.

MR. STEEL: So they naturally would benefit from a functioning operable prime broker. So the claim is all predicated that Lehman breached this agreement. All right.

In the weeks leading up to Lehman's failure and the filing of the SIPA proceeding, and the Chapter 11 proceedings, Newport Global advisors gave them clear instructions that if they abided by --

THE COURT: Okay.

MR. STEEL: -- if Lehman abided by Section 12 --

THE COURT: Now, what did Newport -- so did Newport -- did the funds -- so as a result of Lehman's not following the instructions of your client, bad things happened, you say, damage occurred. Okay.

MR. STEEL: Yes. One, we believe this was willful misconduct and gross negligence, and we still have not received any explanation as to why those instructions were not filed, when thousands upon thousands of counterparties' instructions were filed during the same time frame, and even post time a hundred ten thousand.

THE COURT: And when was the time frame?

MR. STEEL: Well, it was the week before Lehman filed.

THE COURT: They had a few things going on.

MR. STEEL: I appreciate that, most definitely. But that's why I bring up the 110,000 similar accounts that were --

THE COURT: Yes.

MR. STEEL: -- transferred post filing.

THE COURT: Okay. But here's my question. My question is, the funds, have they filed claims against Lehman?

MR. STEEL: Yes, Your Honor.

THE COURT: Okay.

MR. STEEL: And they're still pending five and a half years later, we have not even received any --

THE COURT: Well --

MR. STEEL: -- objections to those claims --

THE COURT: But --

MR. STEEL: -- or any distribution on.

THE COURT: But the funds are asserting their claims against Lehman. Lehman, you didn't follow the instructions of my investment advisor, and you owe me money, right?

MR. STEEL: Yes.

THE COURT: That has nothing to do with that.

MR. STEEL: Those are --

THE COURT: Right?

MR. STEEL: Yes, those are separate claims.

THE COURT: Those are separate claims. Are they asserting claims over against you?

MR. STEEL: Are the funds --

THE COURT: Are the funds asserting claims against your client because Lehman didn't follow your instructions?

MR. STEEL: No. The funds have --

THE COURT: No.

MR. STEEL: -- filed separate claims for the loss of the value of the securities --

THE COURT: Right.

MR. STEEL: -- for them not being returned because of the breach --

THE COURT: Right.

MR. STEEL: -- of the agreement --

THE COURT: Right.

MR. STEEL: -- as it pertains to the funds.

THE COURT: And you're saying, Lehman, because my clients lost value, I lost money.

MR. STEEL: Well, I'm saying the natural and probable and direct result to them failing as a prime broker was the lack of access to the security portfolio managed by the investment manager, which is completely tied to what the

percentage proportion management fee is, on a resulting basis.

THE COURT: Right.

MR. STEEL: So you took the year before Lehman failed --

THE COURT: Oh, I understand.

MR. STEEL: -- and you take the portfolio --

THE COURT: I understand the math, I'm still trying to understand -- you know, I'm reading the words, but I'm still trying to understand why you believed that this confers on the advisor third party beneficiary rights, as opposed to simply stating LBI's undertaking to provide prime brokerage services. They're agreeing to be the broker, they're agreeing to do what they're asked. They're not agreeing to be held responsible for -- to the advisor.

MR. STEEL: Well, it's our position that that's the natural result and given the underlying facts and the questions of fact about the relationship between Newport and Lehman, that we set forth in detail in the May declaration, that's why, Your Honor, I don't believe it's sufficient at this stage to rule as a judgment on the pleadings.

If you look at the May declaration, in combination with the prime brokerage agreement, you see an extremely unique relationship. All right. This is just not your ordinary prime brokerage customer.

Lehman and Newport were so intertwined, you could almost say that Lehman was imbedded in Newport as the back office. And the big point why we think we can definitely satisfy the test of third party beneficiary, deals with a lot of the pre contract and behavior between the parties.

Before Lehman and Newport entered into the prime brokerage agreement, Lehman actively sought to advance and benefit NGA, the investment manager's interest. They went into investor meetings, hand-in-hand, and said, potential investors, we're the backbone of Newport's operations, we're the back office for Newport, and the manager is going to benefit from us being such an efficient and smooth prime broker. They're going to get a management fee based on a proportion of the securities being -- the value of the securities being held in the prime brokerage account, the Lehman accounts.

So that was straight up, presented to the investment community, and Lehman, it's our position, set forth uncontroverted May declaration. We raise an issue of fact, a bunch of questions of fact, whether Lehman intended to benefit the investment manager under the prime brokerage agreement.

THE COURT: But you then -- so you have this situation, but then you execute documents that are completely standard, they look like, not negotiated at all,

and nothing is said about any of that. There's no acknowledgement, there's no provision, there's nothing. It's just a standard brokerage agreement.

MR. STEEL: But, Your Honor, it raises another question of fact, and this is our point here why this is not appropriate at an sufficiency stage to rule on a motion to dismiss judgment for the pleadings, because then you look at the course of dealing under the contract, the operations between Lehman, clear trades, and sent trade confirmations to the investment advisor. They were on the phone with the investment advisor.

For all extents and purposes, Lehman dealt exclusively with the investment advisor on --

THE COURT: Isn't that the way it works, though?

MR. STEEL: Well, that lends itself to saying that they were also --

THE COURT: No, it doesn't, it --

MR. STEEL: -- aware that there was a benefit.

THE COURT: -- lends itself to saying that that's the way it works, that the investment advisor is doing its job. It's making -- it's giving instructions with respect to its clients' accounts, and that it's acting on behalf of its clients' accounts, and it's dealing, it's interfacing with the broker, and it's essentially being a conduit for those instructions.

MR. STEEL: Well, that's our point, it's a natural and probable result, and when your broker stops functioning and doesn't abide by your instructions, and you lose access to your securities, and the result is that corporate events occur, and you're not able to participate --

THE COURT: And the fund --

MR. STEEL: Has a claim for that.

THE COURT: -- had a claim.

MR. STEEL: That's true.

THE COURT: Right. And because you've lost money, because the value of the fund went south, why should that be something that Lehman's responsible for, whether they acted -- unless they directly, intentionally did something to harm you by violating a provision of the contract that directly deals with you?

MR. STEEL: That's our position, they were aware of the management fee, they promoted it to third parties, they breached the agreement by gross negligence or willful misconduct by failing to abide by clear instructions to transfer the securities out of the Lehman morass. Thereafter, they did not transfer post filing. They didn't abide by any corporate --

THE COURT: So if all of that -- if I agree with any or all of that, then if you -- and you say we're in this contract as if we were a party, right.

MR. STEEL: That's --

THE COURT: Then you run into the limitation on incidental and consequential damages.

MR. STEEL: Well, again, Your Honor, that's -- all the case law says that that's a question of fact that's not lending itself readily to judgment on the pleadings.

THE COURT: Well, it's a question of fact whether -- how much they are, but it's not a question of fact that what you allege is identifiable as a consequential damage, which is by the terms of the contract barred. The question of fact is how much of the consequential damages are they.

You're trying to convince me that whether or not something is a consequential damage.

MR. STEEL: Yes.

THE COURT: Right?

MR. STEEL: Yes, Your Honor, I'm trying to convince you --

THE COURT: Is a question of fact.

MR. STEEL: Yeah. Two things I'm trying to convince you.

THE COURT: Okay.

MR. STEEL: One, we're alleging direct damages; and two, that any limitation on liability in the prime brokerage agreement is inapplicable and unenforceable against the manager.

THE COURT: Because?

MR. STEEL: Both, I submit, are questions of fact. The latter, it's unenforceable because Lehman committed willful misconduct and gross negligence that directly harmed. I mean, we've submitted uncontroverted sufficient facts in the May declaration that says that they failed to abide by clear instructions in breach of the agreement. I submit that that was intentional and reckless.

And I think it's uncontroverted at this stage in the litigation. And I think that limitation of liability clause which are disfavored and closely scrutinized under these set of facts cannot be the basis to dismiss our claims on a 12(b)(6).

On the direct damages point, the Biotronic case that we cite to and also Lehman cites to, rejects a Bright-Line rule saying this is consequential damages as compared to direct damages. It goes through that in quite length.

I don't believe that we can set forth claims like the Vibra (ph) case that Lehman also relies on, where we're just saying we lost an opportunity to set resale stuff, or get replacement value for some goods.

We submit that the failure to transfer the securities into a safe harbor, and then shutting us out, and putting us in the dark, and allowing us not to access them, so they just atrophied directly and probably resulted in the

decrease in the management fees. It's straight math.

THE COURT: And so if I were to agree with you on all of that, then I should also agree with you that the fact that you weren't able to enter into a transaction is Lehman's -- is something that's on Lehman, that Lehman owes your client $70 million because after the world came to an end on September 15th, 2008, some transaction didn't come together, and that was something that Lehman intended by its entering into the prime brokerage agreement to promise you?

MR. STEEL: They promised to abide by the instructions with respect to this.

THE COURT: And then all consequential damages flowing from that, they're responsible for, including the fact that you weren't able to consummate some transaction that you've been working on for a couple of years before then.

MR. STEEL: Again, our position is it's not a consequential damage, it's a direct damage because what would the fund in the M&A transaction being offered to sell. Their security portfolio, without access to security portfolio, there's no opportunity to (indiscernible) transaction.

THE COURT: What do you think the difference is between a direct damage and a consequential damage?

MR. STEEL: Well, direct damage is of a natural

and probable result of the breach.

THE COURT: And what's a consequential damage?

MR. STEEL: Well, they'd have to -- you'd have to take it a step further to see if there was a separate collateral sort of a resale opportunity.

So I think it's triggered automatically --

THE COURT: Isn't it true --

MR. STEEL: -- by the lack of access to securities.

THE COURT: -- that your clients have -- are the ones who have the direct damage, and everything else is consequential? A direct damage is what happened to the securities in your clients' account, because Lehman failed to follow the instruction. Everything else is consequential, I think.

I don't -- I'm not hearing a crisp distinction between direct and consequential in your view of damages.

MR. STEEL: Our position is it's still a question of fact that the records should be built as opposed to just judgment on the pleadings, because I think there is a question of fact whether the direct and probable consequences of freezing our clients out from their securities portfolios automatically triggered the reduction in the management fee, and the loss of them, and any opportunity which both were well aware to Lehman.

And the only reason they were not consummated was because Lehman's willful misconduct.

THE COURT: So do you think that Lehman had other agreements that look like this?

MR. STEEL: I'm sure they did.

THE COURT: Right. So do you think that every investment advisor who finds himself in this situation then, I have to give them an allowed claim? No?

MR. STEEL: Not at all, Your Honor. That that was the purposes of us submitting the May declaration to show what a unique relationship that Lehman was well aware and promoted this particular investment manager as a third party beneficiary.

I think we set forth uncontroverted facts to that effect, and in the cases that were cited to Your Honor, Your Honor is allowed to consider those surrounding circumstances. And right now, this is a sufficiency hearing. That was the first thing that Mr. Turner said in -- over and over, the road map really -- what you asked me to address at first was -- raised question after question of fact, and it's not appropriate for judgment on the pleadings at this time in a sufficiency hearing.

I mean, we're still trying to figure out and drill down what was the intent to NGA leading up to the contract. What's the intent to NGA subsumed in the contract. What was

the intent to benefit NGA in connection with the course of dealing of the contract, so.

THE COURT: But Mr. Smith's argument is that you don't -- I don't need to get to intent, because I can leave the contract and I can see nothing within the four corners of the contract that remotely indicates anything that makes the advisor a third party beneficiary of the contract. Nothing.

MR. STEEL: And I think that's contrary to the cases that I cited, the four cases --

THE COURT: Okay.

MR. STEEL: -- which didn't look solely to the contracts.

THE COURT: Okay.

MR. STEEL: And determined on whether it's ambiguous or not. And I also think within the four walls of the contract, that Section 21 supports our position --

THE COURT: Okay.

MR. STEEL: -- when you look at the surrounding circumstances.

THE COURT: Okay. Thank you very much.

MR. STEEL: Thank you, Your Honor.

THE COURT: Any reply? Mr. Smith?

MR. SMITH: I know you have a full courtroom, I'll pass on the reply.

THE COURT: Okay. All right. We'll get back to you, thank you very much.

MR. SMITH: Thank you, Judge.

THE COURT: Thank you. All right. So should we revert to the 77, the distributed action, and then I know I have folks waiting for a conference as well. And, Ms. Marcus, I think that's it, is it not?

MS. MARCUS: That's correct.

THE COURT: Have we reached détente?

MR. BOCOUZZI: Unfortunately, I don't think so, Your Honor. They could add their gloss, but we would -- we thought we could get to the concerns that Your Honor had raised, and really be an efficient way to deal with everything, was to do a concurrent briefing of the motions to dismiss, and the motion for class certification.

The discovery from class cert could inform both ways really, help the Court --

THE COURT: Uh-huh.

MR. BOCOUZZI: -- deal with what, if anything, you could certify or needed to, or what was left in the case. And also we were prepared to say, and if there's a concern about people jumping out of the weeds, put in the order that the defense side is limited to X number of briefs, which we also think answers any concerns about self-governance.

Someone reminded that Judge Gerber in the Lyondell

case is letting the defendant self-govern in that case. But Lehman doesn't want to do that. So I think we're just left now with -- we're happy to turn in another proposed order that would track the things I'm saying and leave it to Your Honor to decide that. But that's the status after the hall visit.

THE COURT: And why don't I hear from Mr. Defilippo.

MR. DEFILIPPO: Thank you, Your Honor, Paul Defilippo for the plaintiff.

On the parallel track issue, Your Honor, if you remember the Ballyrock decision actually involved a motion to dismiss that was denied. And our pleading here pleads the flip clause ipso facto claim almost exactly the way it was pled in Ballyrock.

So if Your Honor is, in fact, going to follow Judge Peck's decisions, then there's no reason to have a motion to dismiss on the ipso facto clause. We've plead it the same way we've done it already, unless the objective is to give the defendants a chance to seek interlocutory appeal, which you may also recall was denied in Ballyrock. But that's not to say they're not willing to try it again.

And that gets us back to the whole fragmented litigation problem, if we go that route. So that's why we don't think parallel tracking the merits determinations and

the class issues are necessarily a good idea.

With respect to the other allegedly dispositive issues, Your Honor's instincts we think were correct initially when you said anybody who thinks they have good cause to step out of line can raise their hand, send me a letter and if they do, in fact, I'll give them the opportunity. Why doesn't that work? We think it works perfectly.

The mediators who are conducting the ADR process are experienced lawyers, and some of them are former judges. They are hearing the arguments that would be raised on motions to dismiss in the process of mediating the cases. And when people get the feedback from the mediators, they have, you know, shown the willingness to settle that we are here to promote. And that's another reason we think taking those issues away from the mediators doesn't make sense at this point.

THE COURT: I have to say, I'm really inclined to go the class certification route first. I think there's a reasonable basis for doing it. I think it's the most efficient overall. I think it's the least costly overall. I think that if there emerges something that is unique that you believe merits what we've been calling stepping out of line, I'll hear it, I'll read it, and I'll decide.

But I see no -- I don't even see the tunnel by

starting with a series of 12(b)(6) motions. I just -- I'm very concerned with due process, but I'm also very concerned with efficient process. And I think the best way to address everybody's concerns is to deal with the class first, and in the process of that, I think there will be some natural sorting and movement towards narrowing, and then we can take up the 12(b)(6) promptly after we get to the end of that.

I really don't see why the class certification given how well organized a substantial group is, and how well organized generally this matter is, should take as long -- should take six months. Maybe I'm just being overly aggressive or overly optimistic. I just don't believe it should take that long. And I think that going the 12(b)(6) route, multiple iterations will take much longer and will create a lot of difficulties.

It will -- I will end up having to sort these actions into lots of different little buckets, and I just see that as something that is not going to promote the efficient resolution of the case.

So what I would suggest you do is get back together and look at the order and add language that -- I want personal jurisdiction claims to be able to proceed. They're in a separate category, and I want there to be an ability to raise other unique and uniquely dispositive type issues in the nature of a letter request, requesting a pre-

motion conference, and I can consider them that way.

MR. DEFILIPPO: Yes, Your Honor.

THE COURT: Now, do I have to deal anymore specifically with the liaison counsel issue?

MR. BLOCKER: Well, Judge, can we be heard on that?

THE COURT: Sure.

MR. BLOCKER: I'm Mark Blocker from Sidley Austin in Chicago, and I'm going to speak to the liaison counsel issue, as well as the other issues that Mr. Defilippo raised, if you have any interest in hearing about them.

Let me just start with an overview here. What Lehman wants by using Lehman -- liaison and executive counsel is to have each grouping of defendants designate people who would serve on the executive committee, and then a liaison counsel who would essentially be the only person who would be allowed to participate in various phases.

So their proposal is that a liaison counsel would be the only one to participate in, for example, class certification discovery.

We think that that proposal is truly extraordinarily -- it's extraordinary and it's unprecedented, and we would ask the Court to reject that and allow us to self-govern.

If you're counting cases here, Judge, the only

case they have where there was any use of this in the context of a defendant class action --

THE COURT: Uh-huh.

MR. BLOCKER: -- and we understand, in the context of a plaintiff's class action, it's much more common to have that. But the reason that it's done in the plaintiff's class action is usually is what you have is warring camps of plaintiff's class action lawyers.

THE COURT: Right.

MR. BLOCKER: And there has to be some semblance of order to that.

Look at the back of the room. There's -- we have the lawyers for 77 defendants who filed a single brief. We are not warring. We are already in the process --

THE COURT: You're singing Kumbaya, it's wonderful.

MR. BLOCKER: We are already self-governing, Your Honor. And so the expression a picture speaks a thousand words, this picture speaks a thousand words. We can self-govern. We do not need a liaison or executive committee structure, for which we think there's no precedent in the defendant class action context.

But let me address the Tribune case, because that's really the only case that the plaintiffs had, but if you look at --

THE COURT: Well, let me suggest this --

MR. BLOCKER: Uh-huh.

THE COURT: -- I agree with you.

MR. BLOCKER: Okay.

THE COURT: Okay.

MR. BLOCKER: And I'll shut up.

THE COURT: Okay. So why don't we, as we're tweaking the order --

MR. BLOCKER: Uh-huh.

THE COURT: -- why don't we agree that you're going to self-govern unless the debtor, you know, raises his hand and steps out of line and says that the self-governance is not working and asks me to revisit it, you know, for something like Clause Joe (ph).

MR. BLOCKER: That makes sense to us.

THE COURT: If the self-governance falls apart and doesn't work, then they should have the ability to come to me and say they didn't speak truthfully or it has or they did speak truthfully, but it just has fallen apart.

I mean, it may well be that at this stage, you're all able to get along and self-govern, but that perhaps parties' interest will diverge and something else will happen. And then they ought to be able to revisit it. But I think if you continue to conduct yourselves the way you have leading up to today, then they should be happy.

MR. BLOCKER: Okay. Thank you, Your Honor.

THE COURT: Is that acceptable?

UNIDENTIFIED: Yes, Your Honor.

MR. SCHAFFER: Your Honor, Eric Schaffer.

THE COURT: Yes.

MR. SCHAFFER: I --

THE COURT: You're wearing your distributed hat?

MR. SCHAFFER: I don't want to interfere.

MR. BLOCKER: No, go ahead. I have two other issues I wanted to raise, Your Honor.

THE COURT: Okay. You're rising with your distributed hat now, right?

MR. SCHAFFER: Yes, yes.

THE COURT: Okay.

MR. SCHAFFER: But I'm here, Your Honor, just with regard to the group of five trustees --

THE COURT: Okay.

MR. SCHAFFER: -- that I referenced before. We have two that I would call housekeeping issues. One is that we've objected that any scheduling order should provide that the trustees need not have any involvement in class action issues.

Now, I heard plaintiff say, well, you have to participate in discovery, and we certainly agree with that. We think an order should make clear that because we are not

part of any punitive class, that we simply participate in discovery. We'll respond to requests, but we don't have to otherwise --

THE COURT: I think that that was the intent.

UNIDENTIFIED: Yes, Your Honor.

THE COURT: Okay.

MR. SCHAFFER: And the one other point we had is that no opinions or orders on any class action issues should have any preclusive effects on any of the trustee's claims or defenses.

Now there I heard counsel saying, no, no, you're going to try and have a second bite at the apple. My response to that is, we're not implicated in any of the class action issues, so we shouldn't have to spend a lot of time and money on issues that really just affect the 77 and others who stand with them.

THE COURT: Okay. I agree with both things that you said, but I'm not clear on why the first part of it doesn't give you a hypothetical second bite at the apple. You're a trustee, so you're in a different position, right. So -- say the first thing that you said again, Mr. Schaffer, the first part of it.

MR. SCHAFFER: The question is, if you enter an order in connection with the class action issues, should we be bound in any way. And to the extent that you're dealing

with issues that relate solely to the noteholders --

THE COURT: Right.

MR. SCHAFFER: -- then it follows we ought not to be bound. And while that seems self-obvious to me, I hear plaintiff saying, oh, no, anything that's been covered in any form in connection with the class action --

THE COURT: But what you're saying is, that it's going to be an empty set, nothing.

MR. SCHAFFER: Yes. Yes.

THE COURT: Right?

MR. SCHAFFER: Yes.

THE COURT: So if it's in fact an empty set then it doesn't matter.

MR. DEFILIPPO: That's correct, Your Honor, but if you do make a determination that has substantive --

THE COURT: How -- yeah, I'm just trying to picture something that's not an empty set on this issue. Some substantive determination that you would want to and that the trustees would properly be bound by. And I'm --

MR. DEFILIPPO: You give them warning in advance, that they have the chance to participate.

THE COURT: Yes. So --

MR. SCHAFFER: Your Honor, I think that works.

THE COURT: -- that works?

MR. SCHAFFER: If they raise their hands and say,

we're now going to try and bound you with something --

THE COURT: Good.

MR. SCHAFFER: -- then we're on notice.

THE COURT: Okay. Excellent.

MR. SCHAFFER: Thank you.

THE COURT: Okay.

MR. BLOCKER: Judge, I just wanted to touch on a couple of other items, about which there are disputes between the two orders, and you can provide guidance and we'll work with Lehman --

THE COURT: Okay.

MR. BLOCKER: -- to implement whatever Your Honor decides.

But one issue that we've -- there is agreement and disagreement as to whether to lift the ADR stay so that all defendants can participate in the litigation. And I think I can summarize the positions of the parties essentially as follows.

Lehman's position is, they agree the ADR stay should be lifted, but only on an as-needed basis, and we don't know what that means, and we think that will lead to satellite litigation.

What we think is appropriate is if this is going to become real litigation, if we're going to start working on issues like class certifications and motions to dismiss,

the defendant should be able to freely participate without having to make some petition or have some further ruling about whether the ADR stay applies.

So our proposal and our order, Your Honor, was to have the ADR stay lifted, so that defendants can participate in every phase of the litigation without exception, without any further guidance from Lehman.

THE COURT: Well, I actually wanted to talk about this particular aspect of it, because I didn't understand how it is that certain of the defendants aren't prejudiced.

I -- in my mind, you were going to do both. But I have -- I think I have a lack of an understanding on how exactly this was going to work. I have to say if the next thing you were going to talk about is the confidentiality --

MR. BLOCKER: Yes.

THE COURT: -- I think the confidentiality should stay in place.

MR. BLOCKER: Okay. Well, can I make my pitch on that --

THE COURT: Okay.

MR. BLOCKER: -- and see if I can change your mind? But first of all on the first point, Your Honor, about letting defendants freely participate.

What we understand Lehman to be meaning is they will make applications periodically to lift the stay for

whenever they see fit, in order to allow whatever defendants they think are appropriate to participate in the ADR stay. We just don't think we should have to go through that process. We just want --

THE COURT: Well, I'm not understanding this. I thought I'd been doing pretty well understanding everything that you folks were saying.

MR. BLOCKER: Well, maybe you should ask Lehman then what it has in mind.

THE COURT: But can you explain this to me, I don't understand.

MR. DEFILIPPO: Mr. Slack is going to.

THE COURT: Okay. Thank you. How are you?

MR. SLACK: Hi. Richard Slack from Weil Gotshal.

THE COURT: So help me out, Mr. Slack. I don't understand the lifting the stay --

MR. SLACK: The interplay between the AD -- yes.

THE COURT: Yeah.

MR. SLACK: Let me try and explain what we were doing in our order, and how the two interrelate. And I think it works actually really, really well.

THE COURT: But up till now everything's -- there's been a stay. So it wasn't an issue.

MR. SLACK: That's right, it hasn't been an issue.

THE COURT: Right.

MR. SLACK: There's been -- well, there's been -- there's actually two separate --

THE COURT: Two stays, right.

MR. SLACK: -- stays in place. One if the ADR stay.

THE COURT: Right.

MR. SLACK: And the other is the avoidance action stay.

THE COURT: Right. So we're coming to the end of the avoidance action stay.

MR. SLACK: That's correct.

THE COURT: Right, okay.

MR. SLACK: So the ADR stay essentially says that when you're in this ADR process, that litigation is stayed, it allows the parties essentially to go through the ADR process without having -- without litigating with each other --

THE COURT: Right.

MR. SLACK: -- as you go. And it's obviously been very effective and --

THE COURT: Right.

MR. SLACK: -- for both parties, neither party has to spend money --

THE COURT: Okay.

MR. SLACK: -- essentially litigating with each

other.

THE COURT: Right.

MR. SLACK: So how this would work in --

THE COURT: In a non-stayed world.

MR. SLACK: In a non-stayed world --

THE COURT: Right.

MR. SLACK: -- let's say that you had a defendant that was in ADR, but also a defendant in this action.

THE COURT: Right.

MR. SLACK: The way we set it up and I think the way the order it sounds like Your Honor is going to issue it, is that class cert is going to go first.

THE COURT: Right.

MR. SLACK: So what we would propose doing is still having the ADR stay in place, but having it lift with respect to the class cert issues --

THE COURT: Okay.

MR. SLACK: -- while they were going on.

THE COURT: Right.

MR. SLACK: So that everybody under your order --

THE COURT: Yes.

MR. SLACK: -- that you do, could -- everybody, no matter who it is, and no matter if they're in ADR or not --

THE COURT: Right.

MR. SLACK: Could participate in the class cert.

And then, Your Honor, this is a little different. This is what you came up with today. Let's assume that somebody comes in, they're in ADR, they raise their hand and they say, there's something different about us, Your Honor, and we want to have a separate motion.

In that kind of a circumstance, Your Honor would --

THE COURT: On a one-off basis lift the -- could, could.

MR. SLACK: I mean, you could also take into account, for example, well maybe what you should do is finish the ADR --

THE COURT: Right.

MR. SLACK: -- and then raise your hand --

THE COURT: Okay.

MR. SLACK: -- in a month or two or whenever --

THE COURT: Right.

MR. SLACK: -- it is when the ADR is up, but that would be up to Your Honor.

THE COURT: So what I would characterize --

MR. SLACK: But in that --

THE COURT: -- this as the best of both worlds' proposal, right? That you're saying, there's not going to be prejudice to those who are in the ADR process, you still get the benefit of the possibility of getting out to ADR --

MR. SLACK: Yes.

THE COURT: -- but your rights aren't being prejudiced, and you're only being asked to litigate for the phase that we're in. It's limited to the phase that we're in, so that --

MR. SLACK: Exactly.

THE COURT: -- that's what I thought we were going to do.

MR. SLACK: So that's exactly right. And I would say this, if there's ever a time, Your Honor, where somebody actually feels prejudiced by the ADR stay, they think it hasn't been lifted appropriately, they can always come to Your Honor, I don't think --

THE COURT: But the effect of the -- what I'm -- the way you've described it, which is the way I was thinking about it, is that effectively, the ADR stay has been lifted is not in place for the purpose of participating --

MR. SLACK: That's right.

THE COURT: -- in the phase one. And ADR is --

MR. SLACK: That's right.

THE COURT: -- still continuing to go along.

MR. SLACK: That's absolutely right, Your Honor.

THE COURT: So.

MR. SLACK: That's exactly the way we proposed it. And as your scheduling order, if you're phase two, however

you want to call it says we're going to have any kind -- you know, certain motions, the ADR stay would lift with respect to phase two.

THE COURT: Sure, it would have to.

MR. SLACK: That's right.

THE COURT: It would have to. So --

MR. SLACK: But it's just going to lift as you're going.

THE COURT: So --

MR. SLACK: So I'm done explaining.

THE COURT: That doesn't make you happy. So tell me why.

MR. BLOCKER: No. No, Your Honor. Because what that suggests -- it would be easier and more efficient to lift the stay generally so defendants can participate in this litigation. We will obviously be bound by whatever order, scheduling order Your Honor enters, and whatever phasing Your Honor enters it in, but there's no reason that -- take the example that Mr. Slack was talking about, where a defendant decides that it needs to come in and ask Your Honor for something.

So now that defendant first needs to go to Lehman, get some permission to get the ADR stay lifted, they need to go to Your Honor, who has very limited hearing dates, set up a hearing date to --

THE COURT: Okay. But let's fix that.

MR. BLOCKER: -- get the ADR stay lifted.

THE COURT: So we can fix that.

MR. BLOCKER: I can fix it. If you lift the stay entirely so we don't have to do this on a piecemeal basis, that makes more sense.

THE COURT: Okay. So let me meet you halfway, all right. So you're all going to participate in what we're going to define as Phase 1. And you're all going to continue to be in ADR. If you want to do something else, then in that request, it can be a combined request for relief from the stay, and a request to do that thing that you believe that you want to do.

MR. BLOCKER: Right. The only reason I'm quibbling with Your Honor about that is, it seems wasteful to have that interim step. If a defendant believes it needs to do X, whatever Your Honor is hypothesizing as X, why should --

THE COURT: But now we're --

MR. BLOCKER: -- it have to go through the process?

THE COURT: Now we're getting -- now we're all becoming really, really lawyers, okay.

MR. BLOCKER: Yes, we are, yes.

THE COURT: Okay. We're really becoming lawyers.

Because if the only thing that I'm saying that can be done in the litigation, is what's going to be part of Phase 1, then that's the only thing that you can do anyway, other than the raise your hand procedure.

MR. BLOCKER: Okay.

THE COURT: So we're now arguing about nothing.

MR. BLOCKER: Well --

THE COURT: Another lawyer wants to convince me.

MR. BOCOUZZI: Just to be an egghead lawyer, the possibility, that gets the possibility and someone over at that table raised it, if someone got an order and they want to try to get appeal -- appeal to the district court, or withdraw the reference, it seems like we're inviting -- unless Your Honor says that's part of the phase, otherwise we're just inviting ancillary litigation for say, can I lift the stay, so that I can move to withdraw the reference, or for an appeal, and then get that permission --

THE COURT: That's --

MR. BOCOUZZI: -- and if it's not, now you're in violation of the stay.

THE COURT: That's not the kind of thing that I was anticipating was going to happen.

UNIDENTIFIED: Meaning you envisioned it being outside of --

MR. BOCOUZZI: (indiscernible)

THE COURT: I'm sorry?

MR. BOCOUZZI: You weren't anticipating what, that there'd be an attempt to appeal something, or an attempt to --

THE COURT: I don't understand what would give rise to motions to withdraw the reference at this particular point. Now, you're making me very concerned that I'm missing something because the whole point of this conversation was, everybody's coordinated, we're not doing things piecemeal.

So you're now giving me concern that you want to set up that will enable you to, in fact, do things very piecemeal. So now you've lost me.

MR. BOCOUZZI: It's not a proposal to make it piecemeal, Your Honor, it's just trying to understand if people have rights to do something, whether they have to go through the initial stay procedure or just -- we're participating in ADR, so it's just saying yes, everyone is (indiscernible) ADR, but there's not a threshold to sort of lift the stay for anything that they may deem or may be a question that's not part of the protocol.

THE COURT: I'm -- the stay is going to stay in place, other than with respect to the participation in Phase 1.

MR. BLOCKER: Your Honor, with respect to the

confidentiality issue, I understand Your Honor's comments. We'd ask you to consider the following, which is there's a reason we think the confidentiality piece should be lifted as well as -- the plaintiffs are seeking -- Lehman is seeking to treat this as a class action, right. They claim this should be certified as a class.

I know of no class in which the defendants are not allowed to talk among themselves about any topic that's of interest to them, including settlement. And I don't see why if this case is going to be forward, it shouldn't be treated like any other litigation so that defendants can talk among themselves about any topic they want, including settlement.

THE COURT: But I might -- I would be inclined to agree with you, but when you become a class, we will revisit it, and I would be very inclined to agree with you. But for right now, where what we're hoping is that there will continue to be ADR resolutions, and there seems to be every indication that that's been working, then I don't want to take that away just yet.

MR. BLOCKER: Yeah. Your Honor, on that front, I guess an observation I would make is most of the statistics that Lehman's counsel talked about in terms of the ADR and how successful the program has been, have almost been entirely in the context of the non-distributed actions, not as much success, as far as I know, in the distributed

actions. That's why we're here today. That's why you've got a group of 77 defendants that are noteholders. And so I don't think there has been that same level of success.

THE COURT: Well, but that might change now that we're moving into the post litigation stay phase and heading towards the class certification.

MR. BLOCKER: I guess that remains to be seen, Your Honor.

I just want to address a couple of final issues. We have proposed in our order, a number of items that we thought would help the defendants organize, so that we could self-govern --

THE COURT: Okay.

MR. BLOCKER: -- and stay organized. And I just want to tic those off for you and explain we want it, and why what Lehman's proposed isn't sufficient.

First of all, we asked for contact information for all the defendants. Now, that sounds like a simple thing. Yes, we could go to the docket, but there are about 50 or 60 defendants who have not appeared. It's quite possible Lehman has the lawyer contact information for those defendants. And if they do, we'd like to help bring --

THE COURT: Okay.

MR. BLOCKER: -- them into the group or understand why they haven't appeared.

THE COURT: So that --

MR. BLOCKER: So it seems --

THE COURT: That seems like an easy one.

MR. BLOCKER: Okay. The next one is --

THE COURT: Can I get a response, Mr. Slack, is that your --

MR. SLACK: I didn't actually hear, I --

THE COURT: Contact information.

MR. BLOCKER: For all defendants appearing or not appearing.

MR. SLACK: So I --

THE COURT: You've got to come up to the mic so we can record you.

MR. SLACK: I'll have to talk to my client. I know that there's been -- that the people who have appeared are obviously on the docket. And so those are easy. But I'd need to talk to my client and then we can have a conversation off line.

THE COURT: Okay. Well, it seems to me whatever you have you ought to share with them for the sake of efficiency.

MR. BLOCKER: We'll talk with Lehman, given your comments, Your Honor.

The second piece of information we thought would be helpful is knowing the amounts that Lehman is seeking

from each defendant. Because right now, no defendants know that, other than in the context of ADR. And so it would -- I know of no litigation again where the defendants as a group or individually are not going to be told how much is being sought for each defendant.

And the reason that --

THE COURT: You mean the amount -- you mean linking up the distributee with the amount of the distribution received?

MR. BLOCKER: How much Lehman is seeking in damages, how much they are seeking to recover from each defendant in this action. And the reason that information is important, Your Honor, is one way we might decide to coordinate and self-govern is by looking at the size of relative exposures. It would be useful for Lehman to provide the information, so we had information about the size of relative exposures, which right now we don't have and can't get frankly because of the ADR.

THE COURT: Because of the confidentiality?

MR. BLOCKER: Yes. Because that's the only context in which we have.

THE COURT: So is that the end of your list?

MR. BLOCKER: No, I have three others, Your Honor.

THE COURT: Okay. Well, let me hear -- I think it's better to do them one-by-one.

MR. BLOCKER: Sure, if you want me Mr. Slack to come up, I'm happy to have him up here.

MR. DEFILIPPO: I think the trustees have that information on what's been distributed to the defendants, Your Honor, we don't have it all.

MR. BLOCKER: Judge, there's a difference between what was distributed to the defendants, and what Lehman is seeking out of that distribution. So for my own client --

MR. DEFILIPPO: (indiscernible)

MR. BLOCKER: -- I know there's a delta between those two.

MR. BOCOUZZI: No, that's not true at all.

THE COURT: So --

MR. BOCOUZZI: No, for some of the deals, there are mark-to-market issues, and I know this because I'm the defendant in one of them, where the amount that was distributed to my client, they're actually claiming less because the way the deal was structured at the end of the day when the music stopped, apart from the clause they say is the flip clause, Lehman would've only been entitled to so much after you value the swap and terminate it and the rest of it.

THE COURT: Okay.

MR. BOCOUZZI: So it's not always a one-to-one match.

THE COURT: Okay.

MR. BLOCKER: Right. So we can't get the information from the trustees. The table right here is the only place we can get that information, so we're asking that it be provided so that defendants can coordinate, so they will know the relative exposure.

THE COURT: So are there any confidentiality issues with respect to that? I don't think so. I wouldn't think so.

MR. DEFILIPPO: We're going to have to put it in the record here.

THE COURT: You're going -- right.

MR. DEFILIPPO: I'm not sure we know.

THE COURT: Well --

MR. BLOCKER: I've never heard that before, Judge.

THE COURT: That -- well, that's not a good answer. That's not a good answer. So I think that to the extent that you know it, which I certainly hope you know it, I think you ought to share that within some practical time frame.

MR. BLOCKER: And I think this goes with the same -- in the same vein, Your Honor --

THE COURT: And to the extent that the trustees, I mean, let's you know, do a Judge Gerber sauce for the goose here, right, to the extent that the trustees have a database

with respect to the distributions, apart from what Lehman's claiming, then that ought to be shared with everybody as well, to the extent that the trustees don't assert some sort of a confidentiality issue, which they might assert.

UNIDENTIFIED: Your Honor, I suspect that's a non-issue, because they've done discovery of us, and we've told them that in almost every instance it all went to DTC.

MR. BLOCKER: I mean, at the end of the day --

THE COURT: Okay.

MR. BLOCKER: -- we're only going to be able to get it from Lehman. But we'll take --

THE COURT: Okay.

MR. BLOCKER: -- Your Honor's point if there are other places --

THE COURT: Okay.

MR. BLOCKER: -- we can get some information --

THE COURT: All right.

MR. BLOCKER: -- we will.

THE COURT: All right.

MR. BLOCKER: And the two last items, Your Honor, then I promise I'm done. One thing that we thought would be helpful to organize is to have a grouping of defendants by issuer, so there are 47 different transactions here. If Lehman could tell us which defendants have been involved in which transactions, that would allow defendants to

coordinate and present a united front and a coordinated front on whatever deals are out there, and I assume there's no objection to doing that.

MR. DEFILIPPO: One second, please, Your Honor.

(Pause)

THE COURT: I will add while they're whispering to amuse you, that the Government and the United States for the purposes of determining the workload of this court, does not count this case.

UNIDENTIFIED: Oh, my God, counts it as one.

THE COURT: Zero.

UNIDENTIFIED: Zero, doesn't it count it at all, why is this?

THE COURT: Why? Because it was filed more than five years ago.

UNIDENTIFIED: Oh, okay.

MR. BLOCKER: Duly noted, Your Honor.

THE COURT: My employer, the Government of the United States.

MR. BLOCKER: Welcome to the Lehman case.

THE COURT: Happy to be here.

(Pause)

MR. DEFILIPPO: Your Honor, I think in combination with information from the trustees, we can probably provide this information.

THE COURT: You can piece it together.

MR. BLOCKER: Well, okay, we are happy to consult with the trustees, too, but if Lehman --

THE COURT: But that was a yes.

MR. BLOCKER: Yes.

THE COURT: That was a yes.

MR. BLOCKER: Last item, Your Honor, is we in our order, we have proposed the creation of a document depository, so that the documents for each of the 47 transactions is loaded into one place, that everybody agrees is complete and correct, and there's no dispute over which documents they are.

For the last four years, Lehman has been conducting discovery on its own, without any defendants, and so we would like Lehman to contribute whatever it is they've collected to that document depository.

And it seems like a small --

THE COURT: And how would access to that, how would that work as a practical matter?

MR. BLOCKER: I think it would be worked out amongst the parties in some way that would be acceptable to both sides, but the idea would be, there would be one database available to all of the defendants and to Lehman.

THE COURT: So it strikes me as that now we're going to embark on the class certification process that

that's something that would be something logical that would have to be done in any event.

MR. DEFILIPPO: Yes, Your Honor, except we think the only ones with the pristine complete set of documents are the trustees.

MR. BLOCKER: Well, that's all well and good, Your Honor, but whatever they've got, they can give, and if we need to negotiate or figure out if it's incomplete, that's one thing. But Lehman is sitting on a huge cache of stuff they've collected over the last four years. And it's only fair and equitable that they contribute whatever it is they've got to a database.

We'll talk with the trustees, and our proposed order included a reference to getting stuff from the trustees as well. There's no reason Lehman, who's got it all in one shot, as opposed to having to go eight different trustees, can't give us and contribute whatever it is they have.

THE COURT: It seems to me you can work together to do this, and that will help streamline matters.

MR. SCHAFFER: Your Honor --

THE COURT: Yes, Mr. Schaffer.

MR. SCHAFFER: -- from the trustee perspective, Eric Schaffer, in many instances what the trustees have will be incomplete. There are certain core documents that relate

to the trustee, that the trustees would, of course, have, but there's a lot of --

THE COURT: You might not have schedules and the like.

MR. SCHAFFER: And there's a lot of things going to how the deals were put together. I would think that in almost if not every instance Lehman would have it. If there's something where they can't find something, we're certainly happy to respond to a request. We might ask that it be done pursuant to appropriate discovery, so we don't have questions of whether we are acting in contravention of any privacy rights.

THE COURT: Right, right, okay. Well, it seems to me that you've largely prevailed on all of your points.

MR. BLOCKER: Okay. Well then, with that, I will sit down, Your Honor, but thank you very much.

THE COURT: Okay. Thank you.

MR. LODEN: Your Honor, if I may just address a couple of issues with respect to Ja Hokkaido. Again, it's Steve Loden of Diamond McCarthy on behalf of Ja Hokkaido, along with my partner, Howard Ressler.

I haven't risen to address the substance until now, because quite honestly every time the topic came up during the hearing this morning, it sounded like my position got better.

So I -- and I understand the Court's comments previously that you will allow personal jurisdiction issues to go forward, in effect, us to step out of line.

So I -- assuming that assumption is correct, and that is, in fact, what the Court is doing --

THE COURT: Right.

MR. LODEN: -- then I rise just to address the process for us stepping out of line. There's been discussion about a letter and a request and raising your hand and things like that.

THE COURT: Well, I -- let's --

MR. LODEN: I think we're beyond that.

THE COURT: Let's simplify it.

MR. LODEN: Okay.

THE COURT: With respect to true matters of raising lack of personal jurisdiction, you just file a motion.

MR. LODEN: We can do that by the end of this week, Your Honor.

THE COURT: Okay. So you just file a motion, and agree -- reach out to counsel for the estate, agree on a briefing schedule, and call chambers and get a hearing date as you would if -- as you would in the case where it was a stand-alone matter.

MR. LODEN: That's what we'll do, Your Honor.

THE COURT: All right.

MR. LODEN: Thank you.

THE COURT: Nice and simple. Yes, Mr. Slack?

MR. SLACK: May I be heard just on the ADR stay portion of that, and I just wanted a clarification. Because let's say you have somebody who's been served with an ADR --

THE COURT: They're not relieved from that.

MR. SLACK: Well, it seems to me that the question is, should a party have to go through the ADR process before raising their hand and making a personal jurisdiction motion. In other words, we certainly have had in the ADR process a number of parties that we've resolved where they'd had personal jurisdiction issues, and we had very experienced mediators, including former judges, and they listened to that, and they talked to both sides, and we've been able to resolve a number of those.

And it seems to me that rather than having a blanket rule that it would just allow anybody with a personal jurisdiction motion to make it, it seems to me that if they are in ADR, and that ADR is not completed, it seems to me that that should be able to -- they're not really prejudiced for a few months while it goes through ADR. They should go through ADR and then if they want to raise their hand and talk to Your Honor about a personal jurisdiction motion, that makes more sense, given again, the success that

we've had in ADR with counterparties, with exactly these kinds of issues.

THE COURT: But it just seems to me if somebody on the basis of lack of personal jurisdiction wants to get a determination, that they ought to be able to get a determination. I mean, how many -- again, it's all a question of size. How many folks are we talking about?

MR. SLACK: You know, it could be dozens who think they have -- you know, for -- you know, there's a number of foreign entities and foreign holders. And you could dozens and dozens of motions from foreign holders. I don't know exactly how many, somebody may, I don't, but it's going to be dozens and dozens of people who are foreign who now rather than going through ADR and trying to settle these --

THE COURT: Well --

MR. SLACK: -- and again, we settled a lot of these are able just to file a motion.

THE COURT: Are there dozens in the 77, are there dozens?

MR. LODEN: Your Honor, I can address that partially. When we were contemplating what to do with respect to my client's issues, personal jurisdiction issues, we sought to line up me toos, because we thought we would have a bigger voice if we came in with people behind us. And we called many of the foreign defendants that Mr. Slack

is referencing on the docket, and none of them wanted to join in our current motion.

So we -- as far as our efforts, we are the only ones.

THE COURT: All right. So then they can make their motion and everybody else is going to stay in ADR until they're not. And then they can ask to get out of it.

MR. SLACK: So can we just instead of making a rule, since it sounds like it's not what I'm hearing from Mr. Loden, is this isn't going to be a global issue, let's just make -- let's just allow --

THE COURT: You're here --

MR. SLACK: -- Mr. Loden's client --

MR. LODEN: Well, it's even more simple than that, Your Honor.

THE COURT: You're here, I'm giving you the relief.

MR. LODEN: It's even more simple than that, we have an application on file if the Court --

THE COURT: Now, don't tell me you're a me too?

MR. GOTTFRIED: I am, Your Honor. I am --

MR. LODEN: We've looked, Your Honor, I promise we looked.

MR. GOTTFRIED: Your Honor, Andrew Gottfried, Morgan Lewis representing Deutsche Hypotheka Und Arts Blanc

(ph). We are a me too. We had a personal --

THE COURT: Are you in ADR?

MR. GOTTFRIED: Excuse me?

THE COURT: Are you in ADR?

MR. GOTTFRIED: Yes, we are. And we have also been the beneficiary of this stay for three and a half years, and we think we should have our opportunity to make a motion to dismiss. The speed of ADR is very much controlled by Lehman, as to how they schedule these matters.

THE COURT: How long have you been in ADR?

MR. GOTTFRIED: I believe since March, we started the process, we're still exchanging documents. We don't know when we're going to have an actual mediation in the matter. We don't have a schedule for that.

THE COURT: Well, what's the typical life cycle of an ADR? I mean, I'm beginning to feel that --

MR. GOTTFRIED: I don't know the answer, I can't answer what a typical life --

THE COURT: Well, let's ask Mr. Slack.

MR. SLACK: So there's not a one size fits all, but generally you exchange pleadings. Once the pleadings are in, and it goes into -- we put them into the mediators, who then themselves they'll appoint a mediator.

The mediations happen pretty quickly from then on. Each of them has sort of their own schedule, so it's a

little different, but typically they get scheduled within about a month of getting all the pleadings in, or a month and a half. And you have your mediation session.

And then the only issue, as I'm sure you're aware, Your Honor, sometimes one session isn't enough, and sometimes it is, and sometimes the mediators want some additional information.

So we're still in the stages of this it sounds like where, you know, this just started. So it's -- but it's only going to be probably a month or so before there's a mediation, I would think, if you're in the pleading stage already, a month and a half, two months, somewhere in there.

MR. GOTTFRIED: If I were to have an assurance that the stay would be released as to us in a month and a half, that would be fine.

THE COURT: I'm not in a position to determine whether --

MR. GOTTFRIED: But I don't have any confidence in that.

THE COURT: If I'm not in a position to determine whether or not something can happen in a month and a half particularly when, you know, we're heading into the summer time where who knows had what plans.

I mean certainly by the end of the summer, I would agree with you, and you could renew your application, but

I'm not going to be -- I'm not now going to be nickeled and dimed, I'm just not.

MR. GOTTFRIED: Okay. Thank you, Your Honor.

MR. BOCOUZZI: And just for the record, Your Honor, there are lots of representations about the ADR process, and they don't necessarily comport to my experience of it. I'm in the mediation process going on for about nine months, so the one month, I don't want to -- we don't get into this, but I think it takes a bit longer.

THE COURT: Okay. Well, I think that I can make the general observation that one size doesn't necessarily fit all in this case. So some are going to go more quickly, and some are going to go more slowly.

MR. SLACK: Can I just speak to that? I think what I said was once the pleadings were completed, because of the SPB ADR process and there's a long history to it, the initial times for putting in the initial pleadings because when we were -- we weren't sure that -- especially we're dealing with a non-distributed deals.

THE COURT: Right.

MR. SLACK: We built in time, which is what the counterparties wanted and the trustees wanted.

So when we just imported that for the distributed deals, there's still this extra time built in for the pleadings. It probably -- it may not be entirely necessary.

So the pleading stage can be a little bit longer. Once you hit the pleading stage, actually putting it in and getting the mediation is just a quicker part of the process.

THE COURT: Uh-huh.

MR. SLACK: And again, some mediators will obviously use one session, some will have more, et cetera. But that's really what I was talking about from the time the pleadings get put in.

THE COURT: Yeah, yeah. Okay.

MR. LODEN: Your Honor, very shortly one quick clarification question. I think you said enough from the bench today that gives me confidence that you granted our application. Would you like for us to submit an order or --

THE COURT: Well, do you want to do a separate order, or do you just want to put a line in the order that you're going to submit globally today? I don't have a --

MR. LODEN: We've already submitted an order as part of our application. We're happy to e-mail it to chambers again or however you would like.

MR. DEFILIPPO: We would propose to put it in our order, Your Honor.

MR. LODEN: Of course.

THE COURT: Let's -- they've been taking very extensive notes.

MR. LODEN: Okay.

THE COURT: So I think I would be comfortable seeing it in one global order. All right?

MR. LODEN: Again, I'm not sure how long that order will take, but we're ready and can file and hope to file our motion by the end of the week.

THE COURT: All right. Well, I'm -- today is Wednesday --

MR. LODEN: Yes, Your Honor.

THE COURT: -- I think -- I don't know if they'll be ready by the end of the week, and I am not going to be here on Friday. But as soon as I get their order, I'll enter it. So at most, you're talking about a delay of gain for a couple of days.

MR. LODEN: Okay, fine.

THE COURT: All right?

MR. DEFILIPPO: Thank you, Your Honor.

THE COURT: Okay. All right. Are we concluded except for the conference?

MS. MARCUS: Yes, Your Honor, I think that concludes the --

THE COURT: All right. Thank you all very much for your patience. It's good to see you.

(Proceedings concluded at 1:12 PM)

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I N D E X

R U L I N G S

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